Correction of Error on Motion

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CORRECTION OF ERROR ON MOTION

THREE sections in the West Virginia Code, with the aid of a fourth, have substantially modified the common law and equity methods of reviewing judgments and decrees. Their object is, within certain specified limits, to substitute a motion in the trial court for a writ of error or an appeal. Two of these sections deal with clerical error, or error in fact. One of the two reads as follows.

“For any clerical error or error in fact for which a judgment or decree may be reversed or corrected on writ of error coram nobis, the same may be reversed or corrected, on motion after reasonable notice, by the court, or by the judge thereof in vacation.”

The other, to the extent that it is pertinent to the present discussion, reads as follows.

“A court in which is rendered a judgment or decree in a cause wherein there is in a declaration or pleading, or in the record of the judgment or decree, any mistake, miscalculation, or misrecital of any name, sum, quantity or time, when the same is right in any part of the record or proceedings, or when there is any verdict, report of a commissioner, bond, or other writing, whereby such judgment or decree may be safely amended, or in which a judgment is rendered on a forthcoming bond for a sum larger than by the execution or order of sale appears to be proper, or on a verdict in an action for more damages than are mentioned in the declaration, may, or, in the vacation of the court in which any such judgment or decree is rendered, the judge thereof may, on motion of any party, amend such judgment or decree according to the truth and justice of the case . . .”

* Professor of Law, West Virginia University.
1 W. Va. CODE c. 58, art. 2, § 3 (Michie, 1949).
2 Id. at c. 58, art. 2, § 5 (Michie, 1949).
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The third section, which was combined with the section last quoted in the older codes, is concerned with errors in a default judgment or in a decree on a bill taken for confessed and appears as follows in the Revised Code.

"The court in which there is a judgment by default, or a decree on a bill taken for confessed, or the judge of such court in vacation thereof, may, on motion, reverse such judgment or decree for any error for which an appellate court might reverse it, if section seven of this article were not enacted, and give such judgment or decree as ought to be given."³

Section seven, referred to in the section last quoted, applies to all three of the quoted sections. The portion of it pertinent to the present discussion is as follows.

"No appeal, writ of error, or supersedeas shall be allowed or entertained by an appellate court or judge for any matter for which a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the court which rendered it, or the judge thereof, until such motion be made and overruled in whole or in part . . ."⁴

These statutes, adopted from the Virginia Code of 1860, have always been in the West Virginia Code. Presumably, their presence in the Code and the rationale of their general application have been familiar to most West Virginia practitioners. Still it is doubtful whether many, until faced in practice with the necessity of giving them a special study and examining the decisions construing them, have fully recognized the problems which are involved in their practical application; although, with the exception of the first section, which involves the antiquated writ of error coram nobis, they may appear to be framed in simple terms and in a fairly familiar background of common law and equity principles, and so to require no particular effort for interpretation. Among questions which may arise, depending upon the occasion, are such as these. What is "clerical error or error in fact"? What is the nature of a writ of error coram nobis? What is a judgment by default? What is a decree on a bill taken for confessed? Is it essential that the error appear on the face of the record? What sort of judgment or decree may be reversed by an appellate court?

³ Id. at c. 58, art. 2, § 4 (Michie, 1949).
⁴ Id. at c. 58, art. 2, § 7 (Michie, 1949).
for error therein? What objects of the statutes suggest their spirit for purposes of interpretation?

Perhaps the first impression that may come from a study of the statutes and the decisions construing them will be that answers to some of these questions had appeared deceptively easy. For instance, it will be discovered that "judgment by default", as defined by the court for purposes of construing the statute, does not have the same meaning as in many common law contexts and as the spirit of the statute seems to require; that a decree pro confesso does not have the meaning it has under the ordinary equity practice; and that, while roughly one thinks of a default judgment and a decree pro confesso as arising from approximately the same procedural circumstances, the fact is that a judgment by default and a decree on a bill taken for confessed (using the words of the statute) bear only a remote analogy to each other as defined by the decisions construing the statutes.

Confusion in attempts to rely upon the statutes seems to have arisen from another source. While all three sections are controlled by the same general mechanism, still in many respects they are antitheses of one another and must be carefully differentiated. For example, all three sections cover clerical error, or error in fact; but under two sections the error must appear on the face of the record, while under the remaining section it need not so appear. Under only one section can judicial error, or error of law, be corrected and the error must appear on the face of the record. Under two sections, the possibility of resorting to a motion depends entirely upon the nature of the error; under one section, wholly upon the nature of the judgment or decree.

An effort will be made in this discussion to analyze briefly the statutes involved and to review and cite some of the decisions construing them and texts. No attempt will be made to cover all the details or to review or cite all the decisions. So much, it is hoped, may be justified by the fact that so far the subject has received only brief and desultory attention in most of the texts, particularly the modern ones.

Clerical Error or Error in Fact

The propriety of resorting to a motion under the section providing for a motion in lieu of a writ of error coram nobis, first in
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the series quoted above, depends entirely upon the nature of the error involved. In contrast with the third section quoted, dealing with error in a judgment by default or a decree on a bill taken for confessed, the nature of the judgment or decree is wholly immaterial. Operation of the section is circumscribed by only two limitations: (1) the supposed error committed must be “clerical error or error in fact” as distinguished from judicial error or error of law;\(^8\) and (2) it must be such as would warrant reversal or correction of a judgment or decree on a writ of error 

The terms “clerical error” and “error in fact,” appearing in the statute, are equivalent in meaning. They are used to designate that class of errors which is distinguished from judicial error, or error of law. An error of fact occurs when a judgment is rendered on the false assumption that a certain fact exists, which, it is assumed, would not have been rendered if the court had been aware of the nonexistence of the fact. The judgment is wrong, but not because the court made any erroneous application of the law to the facts; for the law was properly interpreted and applied to the facts assumed to exist. Hence no legal error was committed. The court was not mistaken as to the law, but as to the facts to which the law was applied. On the other hand, if the court renders an erroneous judgment when conscious of all the pertinent existing facts, the error must necessarily result from an improper application of the law to the facts, and the error is judicial: In such a case; there is no mistake as to the facts, and, if there is error, it can only be one of law. One illustration out of a possible variety may be selected. It is the law, of course, that a judgment cannot properly be rendered in favor of a plaintiff who has died before rendition of the judgment. If a court renders such a judgment, aware of the fact that the plaintiff is dead at the time, error of law is committed; because the court consciously acts on the erroneous assumption that a judgment can legally be rendered in favor of a dead man. On the other hand, if the court renders the judgment on the false assumption that the plaintiff is alive at the time, only an error of fact and not an error of law is responsible for the erroneous judgment.\(^6\)

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\(^8\) Yost v. O'Brien, 100 W. Va. 408, 130 S.E. 442 (1925).

\(^6\) See 4 MINOR, INSTITUTES 849 (1878) and ANDREWS, STEPHEN'S PLEADING 248 (1901), for additional illustrations: defendant dead when judgment rendered;
As to the nature of the clerical errors which may be reviewed by the now obsolete and somewhat mysterious writ of error coram nobis (or vobis), Stephen has the following to say.

"Where an issue in fact has been decided, there is (as formerly observed) no appeal in the English law from its decision, except in the way of a motion for a new trial; and its being wrongly decided is not error in that technical sense to which a writ of error refers. So if a matter of fact should exist which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not, after judgment, amount to error in the proceedings. For example, if the defendant has a release, but did not plead it in bar, its existence cannot, after judgment, on the ground of error or otherwise, in any manner be brought forward. But there are certain facts which affect the validity and regularity of the legal proceeding itself: such as the defendant having appeared in the suit while under age by attorney and not by guardian; or the plaintiff or defendant having been a married woman when the suit was commenced. Such facts as these, however late discovered and alleged, are errors in fact, and sufficient to reverse the judgment upon a writ of error. To such cases, the writ of error coram nobis applies, 'because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment.'"

In contrast with the requirements of the other sections involved in this discussion, it is not necessary under this section that errors correctible by a writ of error coram nobis, or by motion under the statute, appear on the record. In fact, it would seem, from what has been said and the illustrations given, that they

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In Campbell v. Hughes, 12 W. Va. 183 (1877), it was insisted that the judgment was erroneous because infant defendants had not been represented by guardians ad litem. The court, at page 211 of the opinion, says: "If any of the defendants are in fact infants, or were so during the pendency of the suit, the parties must be remitted to their remedy in such cases provided by law, by writ of error coram nobis, or motion under section 1, chapter 134, Code of West Virginia 1868." Accord, Curtis v. Deepwater Ry., 68 W. Va. 762, 70 S.E. 776 (1911).

In King v. Burdett, 28 W. Va. 601 (1886), the complaint was that the defendant was dead at the time when the judgment was rendered. The court, at page 609 of the opinion, says: "It is very easy for the personal representative upon motion under sec. 1 of ch. 134 of the Code to correct the error. That section gives an additional remedy to a writ of error coram nobis."

Andrews, Stephen's Pleading 247.
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usually would not so appear. On the contrary, the alleged existence or nonexistence of a fact constituting error may be subject to dispute and under the common law practice a verdict of a jury may be necessary in order finally to determine whether there is error.\(^8\)

In order to understand the full purport of the section under discussion, it is not only necessary to have an understanding of the nature of clerical error or error in fact, but also of the nature and function of the writ of error \textit{coram nobis} mentioned therein.

A writ of error is the common law method of reviewing a final judgment of a common law court. Of writs of error, there are two varieties. One, which has acquired no specific name or title, is sometimes referred to as the writ of error "generally";\(^9\) in other words, it is the ordinary writ of error. It is the one with which modern practitioners are familiar and with which the articles in Chapter 58 of the West Virginia Code are concerned. It has two distinguishing features. One is that by it the judgment is reviewed by an appellate court, and not by the court which rendered the judgment. The other is that, in this country, the writ issues from the appellate court which entertains the review. On the other hand, the writ of error \textit{coram nobis} (or \textit{vobis}) contemplates a review of the judgment by the court which rendered it, not by an appellate court; and no writ issues from an appellate court. The trial court, in effect, sits as an appellate court reviewing its own judgment. The proceeding acquired its appellation in the ancient days when writs and pleadings were in Latin. \textit{Coram nobis} means "before us," and \textit{coram vobis}, "before you." The one or the other phrase was used depending upon the English court in which the judgment was rendered. The purport of these Latin words as labeling the writ of error and why the phraseology varied in the different courts are very well stated in the language of Professor Minor.

"The writ of error \textit{coram vobis} (or \textit{nobis}) is where the alleged error consists of matter of fact; the writ of error \textit{generally} where it consists of matter of law.

\(^8\) "If the adversary does not admit the truth of the fact alleged, (being extrinsic to the record,) which is the ground of the writ of error, it must be ascertained by a jury." 4 MINOR, INSTITUTES 849. \textit{Quaere:} Would a jury be demandable on a motion under the statute?

\(^9\) See 4 MINOR, INSTITUTES 848.
"The former derives its designation from certain words which were contained in the mandate of the writ itself, when it was in Latin; which, commanding the court where the proceeding occurred to inspect the record, and correct the error found therein, states that the record in question still remains coram vobis (before you), in the courts of common pleas and exchequer, and coram nobis, (before us), in the king's (or queen's) bench where the monarch theoretically presides in person. It follows, therefore, that in this country, the proper designation is coram vobis in all cases, our commonwealths never being present in person, in their courts."\textsuperscript{10}

In view of this explanation of the purport of the Latin phrases, it would seem that use in the West Virginia statute of the words coram nobis, instead of coram vobis, is technically wrong; although of course the solecism is harmless.

As to the issuing source and purport of the writ, Professor Minor makes the following statements.

"All writs of error are, in England, as we have seen, issued out of chancery, and constitute a commission to the judges named in them, whether of the same or a higher court, to examine the record, and to affirm or reverse the judgment, according to law. With us, although, like all other writs, they are in the name of the commonwealth, yet they issue from the court which is to revive the proceedings, and consequently, in the case of writs of error coram vobis, from the court where the judgment was rendered."\textsuperscript{11}

The functionary who issues the writ is the clerk of the court in which the judgment was rendered.\textsuperscript{12}

Presumably, this is the practice which would prevail in West Virginia if resort should be had to the writ of error coram nobis (or vobis) for purposes of review. Consequently, we would have the anomalous situation of the clerk of a trial court at the instance of a party, albeit in the name of the state, issuing a command in the form of a writ to the judge of his court directing the judge to review a judgment rendered by him. The incongruity arises from the necessity of resorting to a substitute for the English chan-

\textsuperscript{10} Ibid.

\textsuperscript{11} 4 Minor, Institutes 849; Andrews, Stephen's Pleading 246; Ballantine, Law Dictionary 1378 (1930). But see Black, Law Dictionary 1861 (3d ed. 1933).

\textsuperscript{12} See 4 Minor, Institutes 850 for the form of the writ.
Cory as a source for issuing the writ; and, since no executive functionary possesses such power in this country, nor can a superior court issue this particular writ to an inferior court, as it can in the case of an ordinary writ of error, the only alternative, in order to get a writ for purposes of conforming to the established procedure, is to resort to what may be considered an inferior source, the clerk of the court in which the judgment is rendered. The necessity for this procedural distortion is alone sufficient to demonstrate that the writ of error coram nobis is a misfit in American jurisprudence, and to explain the adoption of a simpler statutory substitute in which a notice takes the place of the writ.

It remains to call attention to a feature of the statute itself which seems to involve an anomaly, if not a contradiction. It will be noted that the statute not only prescribes a motion as a substitute for the writ of error coram nobis as a common law method of correcting error in a judgment, but it undertakes to go further by way of providing that a decree may be reversed or corrected on motion for any clerical error or error in fact for which a "decree may be reversed or corrected on a writ of error coram nobis." The decree mentioned in the statute, of course, is an equity decree. The whole effect of the statute, interpreted literally, so far as it applies to equity, rests on the assumption that a writ of error coram nobis is a proper procedure for reviewing decrees in equity and the statute provides only for correction of such errors in decrees as might be corrected by such a writ of error. Yet, presumably, nobody ever heard of a decree in equity being reviewed by a writ of error,13 which is strictly a common law device administered by the common law courts. The result would be that, if the formula provided by the statute for determining what errors in a decree may be reviewed on motion is literally applied, in conformity with the plain language in which it is expressed, there are no errors in a decree which come within the scope of the statute, and therefore none which may be reviewed on motion. Yet, after all, the statute evinces an intention to provide for correction on motion of clerical errors or errors of fact in decrees, however unfortunate

13 Equity methods of review in the lower court are a bill of review, a petition for a rehearing, and an original bill in the case of fraud or mistake; in an appellate court, an appeal, which corresponds to the common law writ of error.
the method adopted to carry the intention into effect. The contradiction in the statute could have been eliminated and the apparent intent accomplished if the statute had been so worded as to provide, in effect, that clerical errors or errors in fact in decrees may be corrected on motion when they are of such a nature that they could have been corrected on a writ of error *coram nobis* if they had occurred in a common law judgment; and possibly this is the manner in which the statute was intended to be construed. No case has been observed where the statute has actually been applied to an equity decree, but its availability for such a purpose has been suggested in more than one decision. Neither decision nor commentary, so far as investigation discloses, has called attention to this apparent anomaly in the statute.

The second section quoted also, by its very terms, deals with clerical error and not with judicial error. It specifically enumerates the errors to which it applies and specifies the things which may be subject to the errors—"any mistake, miscalculation, or misrecital of any name, sum, quantity or time," things which, it will be observed, are peculiarly susceptible to clerical error. It is largely self-sufficient and, except for the necessity of distinguishing between clerical and judicial error, requires little background for its interpretation and application. In one respect it is unique. It provides a definite and somewhat mechanical method for correcting the errors subject to its provisions—reference from one part of the record or proceedings to another—and no other method is prescribed. Wherefore it necessarily results that, contrary to possibilities under the prior section, errors to be corrected under this section must appear on the face of the record or proceedings. The chief difficulties in attempts to resort to it have arisen from the necessity of distinguishing between clerical and judicial errors. Most of the errors enumerated will, naturally, result from inadverences of the clerk; but, as Professor Minor explains, even the clerk may commit judicial error.

"The practical question, what are the clerical errors which may thus be amended in the same court where they

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14 See, for instance, Fulton v. Ramsey, 67 W. Va. 321, 325, 68 S.E. 381 (1910), citing several cases, all of which, however, are law cases; and Yost v. O'Brien, 100 W. Va. 408, Syl. 1 and p. 411, 130 S.E. 442 (1925).

occur is sometimes rather embarrassing. It is clear that the provision was intended to apply exclusively to those inadvertencies of the clerk which depend upon a comparison and calculation to be made by him, and which may be safely reformed by reference to other statements in writing contained in the proceedings, and not at all to judicial errors growing out of a mistaken application of the law to the facts, notwithstanding such mistaken application be made by the clerk alone, and the court be not directly privy to it; for the clerk acts as the subordinate, and frequently as the assessor of the judge, in cases uncontested. The difficulty lies in discriminating, in many cases, between these two classes of mistakes.10

**Default Judgments and Decrees Pro Confesso**

Errors in judgments by default and decrees on bills taken for confessed are correctible on motion under the third section herein-before quoted, which for convenience is here quoted again.

"The court in which there is a judgment by default, or a decree on a bill taken for confessed, or the judge of such court in vacation thereof, may, on motion, reverse such judgment or decree for any error for which an appellate court might reverse it, if section seven of this article were not enacted, and give such judgment or decree as ought to be given."11

It will be observed that the propriety of resorting to a motion under this section does not depend upon the nature of the error to be corrected, as under the prior sections, but upon the nature of the judgment or decree. Clerical errors and errors of law are equally reviewable.12 Only two conditions are prescribed: (1) the judgment must be by default or the decree on a bill taken for confessed; and (2) the error must be such as would cause a reversal in an appellate court. Of these requirements, the first has presented more difficulties in its application.

The terms judgment by default and default judgment, which are equivalents, have different meanings in different contexts. In a narrow sense, a default judgment is one rendered against a defendant who fails to appear to the action. In a broader sense, it is one rendered against a defendant who fails to make a defense, whether he appears or not. In this sense, it includes a judgment by nil dict (he says nothing), which is a judgment rendered against a de-

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10 4 Minor, Institutes 769 (1878). See idem, 770, for examples.
fendant who appears but fails to plead at any stage of the pleadings when it is his turn to plead. In administering the statute, the West Virginia court has adopted the narrower concept. The result is that, if the defendant has in any manner appeared to the action, his appearance alone, although he afterward suffers a judgment to go against him by nil dicit, is sufficient to prevent the judgment from being one by default within the meaning of the statute. Why the court has adopted this narrow concept, when apparently it was at liberty to adopt the broader one and when, as will appear later, with an equal opportunity to choose, it took a different attitude toward equity decrees, logically is not easy to surmise.

It is repeatedly said in the decisions that the object of this section is to give the trial judge an opportunity to review his own judgments and decrees rendered under circumstances which invite error, and so avoid unnecessary resort to appellate relief. It is emphasized that, when a defendant defaults, the court does not have the aid of counsel on both sides of the case; there is no contest which tends to ferret out latent possibilities of error; and the court does not act with the same deliberation as in a contested case. Wherefore, if errors are inadvertently committed under such circumstances, the court, if given an opportunity, is more likely to correct them than it is to correct errors committed with due consideration and deliberation. All these considerations may constitute valid reasons for making a distinction between contested cases and cases in which judgments are rendered by default or by nil dicit; but it is difficult to conceive how they can offer any adequate justification for a distinction between cases where a defendant has failed to appear and cases where he has appeared but failed to make a defense. Mere appearance without contest can render no aid to the court. Possibly a resort to history, if not to

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19 "In a strict sense a default judgment is one taken against a defendant who, having been duly summoned in an action, fails to enter an appearance in time; but the term is now usually applied where default occurs after appearance as well as before, although such judgments are also designated 'nil dicit.'" 49 C.J.S. 324 (1947). See 4 MINOR, INSTITUTES 766, where a judgment by nil dicit is described as a default judgment.


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logic, may offer some light upon the situation. Professor Minor gives the following explanation of the circumstances surrounding the origin of the statute.

"Prior to 1838, judgments by default of defendant's appearance, were not within the statute of jeofails, (as they are included in the statute above cited.) And, therefore, if any defect, however formal, appeared in them, they were liable to be reversed therefor, in an appellate court. Hence, as every judgment must be founded upon a sufficient writ of summons or arrest, the appellate court, according to the established doctrine, was obliged to examine the writ which instituted the suit, with the endorsements thereon, (notwithstanding the general principle that the writ, except to sustain the proceedings, is not considered a part of the record unless made so by oyer.) Judgments by default of appearance were pretermitted from the earlier statutes of jeofails, and the writ was held in such cases to be part of the record, because it was apprehended that otherwise, the plaintiff would have it in his power to perpetrate a fraud upon the defendant, by issuing a writ for one demand, which the defendant, admitting it to be correct, would forbear to contest; and then filing his declaration and obtaining judgment by default of appearance for a much larger amount. (Hatcher v. Lewis, 4 Rand. 152; Nadenbousch v. Lane, 4 Rand. 418; Wainwright v. Harper, 3 Leigh 270; Paine v. Britton, 6 Rand. 102.) Accordingly, it was always held, in that state of the law, that if the defendant once appeared (in which case he had an opportunity to inspect the writ,) although he afterwards suffered judgment to go against him by nil dicit, (which is also a judgment by default), yet the statute of jeofails applied to the case, and the writ is no part of the record. (Bargamin v. Poiteaux, 4 Leigh 422-3.)

"Our statute of jeofails at present avoids the embarrassment alluded to by a general provision, that in all cases of judgment by default, (that is, not upon issue), the court wherein the judgment was rendered, or the judge in vacation, may, on motion, reverse the judgment for any cause for which before, an appellate court would have reversed it."\(^{22}\)

Clearly, according to this account, the default judgment which needed statutory attention was the one based on nonappearance of the defendant. To what extent, if any, consciousness of this fact had any influence on construction of the statute does not appear in any of the decisions examined; but apparently it could very well

\(^{22}\) 4 Minor, Institutes 765-6.
have done so. It should not be ignored, however, that Professor Minor, in the second paragraph quoted above, describes the default judgment which is the subject of the statute as one "not upon issue." These words can be taken as indicating either a judgment on nonappearance or a judgment by nil dicit.

The rule as to what constitutes a judgment by default under the statute, as established by the decisions, is definite, if not altogether logical. It seems to have come down through the years without deviation or question. But establishment of a rule for determining what constitutes a decree on a bill taken for confessed under the statute has not been so easy and the decisions have not been in harmony.

"There is no conflict in the Virginia and West Virginia decisions as to what is a judgment by default within the meaning of the statute, which we are construing; but our decisions have not been harmonious as to what is 'a decree on a bill taken for confessed' within the meaning of the statute."23

Under the ordinary equity practice, unmodified by statute there are three situations where a bill is understood to have been taken for confessed: (1) when the defendant simply fails to appear; (2) when he fails to answer after his demurrer to the bill has been overruled; and (3) when he fails to answer after his plea to the bill has been overruled, or disallowed, as legally insufficient.24 The decree in the first situation, it will be observed, is analogous to a judgment strictly by default at common law; and in the other two situations, to a judgment by nil dicit. In all these situations, failure to file an answer to the bill is the factor which causes the decree to be one upon a bill taken for confessed. In pursuance of this concept, a decree pro confesso may be described as a decree in a case where the defendant has not contested the facts alleged in the bill, which he can do only by answer, if he has failed to file a plea or his plea has been held legally insufficient; and the confession involved is a confession of facts. Whatever the merits of this concept, it has not been accepted in the decisions for purposes of construing the statute, although at least one minority case seems to conform to its spirit.25

24 See 30 C.J.S. 1104 (1942).
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About one proposition there can, of course, be no dispute: if the defendant has totally failed to appear, the decree must necessarily, under the statute or from any viewpoint, be considered one on a bill taken for confessed. And at the other extreme, if he has contested the facts by a plea or answer, it is clear that the bill has not been taken for confessed. In the middle ground between these extremes, two possible acts by the defendant may be taken as working a confession of the bill: (1) a mere appearance, without making a defense in any respect; and (2) an appearance and, in addition thereto, assertion of a defense on the law by demurrer, without any defense on the facts.

In an early case,29 in which a decree was entered against a defendant after he had appeared, demurred and failed to comply with a rule to answer the court held that the decree was not on the bill taken for confessed. Although the opinion is not clear on the point, the decision seems to rest on the proposition that there can be no such decree except in a case where the defendant has failed to appear, thus applying the same rule as in the case of a default judgment.27 However this may be, later cases leave no doubt that mere appearance, without in some way contesting the relief, will not preclude a decree on a bill taken for confessed. In fact, it will appear from cases later cited and discussed that the defendant may appear and contest the relief at one or more stages of the proceedings and still be in default, within the meaning of the statute, at other stages.

The real conflict in the decisions arises from a difference of opinion as to the nature of a decree rendered after a demurrer to a bill has been overruled and the defendant has failed to answer. In what seems to be the first case dealing with the question, Gates v. Cragg, cited above,28 the court, Judge Green speaking, flatly held, without qualification, that, if the defendant appears and demurs "no decree can be taken against him as on a bill taken for confessed" after the demurrer has been overruled. The test ap-

27 Statements to such effect will be found in later cases. See, for example, Yost v. O'Brien, 100 W. Va. 408, 411-412, 130 S.E. 442 (1925). It is believed, however, that in all cases where the statements are made the defendant did more than merely appear; for instance, he demurred to the bill or otherwise contested the proceedings.
28 Note 26 supra.
plied in this case is whether the defendant made a defense, on the
law or on the facts, and not whether the facts were confessed by
failure to answer.

In the next case in which the question is critically discussed,
Steenrod's Administrator v. Wheeling, Pittsburgh & Baltimore
R.R., Judge Snyder speaking, a precisely opposite conclusion was
reached. The court says:

"The mere appearance of the defendant, certainly does
not prevent the bill from being taken for confessed. Technically
a bill heard without plea or answer is a hearing on a bill taken
for confessed and a decree rendered in such case is 'a decree
on a bill taken for confessed.'" 30

The earlier case, Gates v. Cragg, cited above, which the present case
overrules, is not mentioned in the opinion and the court seems
oblivious of the fact that its holding is in conflict with the prior
decision.

The question came up again for decision some two years later
in Watson v. Wigginton, Judge Green again delivering the
opinion. A realization that the two prior cases were in conflict led
to an elaborate review of former decisions and what may be con-
sidered a compromise between the conflicting views. The result
of this compromise seems to be as follows. If errors in the decree
carrying into effect the overruling of the demurrer and granting
relief are such only as result from overruling the demurrer, then
the decree is not a decree on the bill taken for confessed. Conse-
quently, it is appealable directly and no motion to reverse or correct
in the lower court is necessary or proper. On the other hand, if
that decree, or any subsequent decree rendered on matters not
contested by the defendant, contains alleged errors additional and
subsequent to any resulting from overruling the demurrer, to that
extent the decree is upon the bill taken for confessed and, for
purposes of review, a motion in the lower court is prerequisite to
an appeal.

Judge Green in this case, with the entire court in accord, is
still of the opinion that the proper test to be applied is not merely
whether the defendant has filed an answer, but whether he has in

20 25 W. Va. 133 (1884).
30 At 137.
31 28 W. Va. 533 (1886).
any manner contested the procedure out of which the supposed errors arose, by demurrer, plea, answer or otherwise. In the course of the elaborate opinion, he indulges in an extended analysis in which he calls attention to various situations in an equity suit where, applying the test adopted, some matters all the way from the filing of the bill to a special commissioner's report may rest upon the bill taken for confessed and others may not, depending upon whether or not they were in some manner contested by the defendant. The views expressed in this analysis seem to have received uniform approval in subsequent decisions, where they are referred to as a sort of gospel on the subject, and in some cases have been carried into actual adjudication. Wherefore, it is believed that they may be worthy of extended quotation.

"From this review of our cases I draw the following inferences as to the true construction of sections 5 and 6, chapter 134 of the Code, so far as they prohibit an Appellate Court from entertaining an appeal because of an error in a decree on a bill taken for confessed, until after a motion to reverse or annul such decree has been made and overruled by the court below or by the judge in vacation either in whole or in part.

"First.—If a party, who is a formal defendant in the bill, has failed to appear in the court below in any manner either by filing a plea answer or demurrer, or by filing exceptions to the report of a commissioner in chancery or a commissioner of sale, which may be the basis of the decree complained of, and if he has failed to appear in any other manner, such a defendant can not appeal to this Court, till he has made a motion in the court below or to a judge in vacation to reverse or correct the decree he complains of, and the court below or the judge in vacation has refused to do so in whole or in part. But in such case, if any of the defendants having a joint interest with him in the matter complained of unite with him in the appeal and have answered the bill, this Court will entertain jurisdiction of the appeal and reverse or correct, if erroneous such decree, though no such motion had been made or overruled in whole or in part before the awarding of the appeal.

"Second.—If a defendant in a bill files no plea or answer but files a demurrer, simply on the ground that the plaintiff on the facts stated in the bill is entitled to no relief against him, and the court below overrules such demurrer and awards a rule against him to answer the bill at a specified time, and he fails to do so and a decree is rendered against him, and he
makes no such motion to have it reversed or corrected in the court below, and he appeals from such decree solely on the ground that the court rendered any sort of decree against him, this Court will, though he did not make such motion, entertain his appeal, because such appeal though in form an appeal from the last decree is in substance and in reality an appeal from the decree overruling his demurrer and deciding, that the plaintiff was entitled to relief on the statements in the bill against him, and is therefore not to be regarded as a decree on a bill taken for confessed. But if the appellant in such case does not confine his appeal to the error committed by the court in overruling his demurrer simply carried out in the last decree but insists, that there are in addition thereto other and independent errors in the last decree against him, which should be reversed, even though the Appellate Court held, that the demurrer was properly overruled, this Court will not entertain such appeal, because, so far as these additional and independent errors are concerned, this last decree is to be regarded as a decree on a bill taken for confessed and can not be reversed by this Court, till a motion to correct it has been made in the court below.

"Third.—Though, when the defendant, the appellant, has never in any manner appeared in the court below, any decree against him whenever rendered will be regarded as a decree on a bill taken for confessed, and this Court will not entertain his appeal therefrom unless he has first made his motion to correct it in the court below, yet the reverse of this is not universally true, and in many cases the decree will be regarded as one on bill taken for confessed, though he may have appeared in a variety of modes otherwise than by answer, on which the cause was heard, as, for instance, when he filed an answer but withdrew it, before the case was submitted to the court below on the hearing, or when he appeared simply to consent to a continuance or to a reference of the cause to a commissioner, and in a variety of other cases which might be suggested. In such cases he could not appeal from any errors in such decree, unless he had first moved the court below to correct the errors in the decree, of which he complains. But on the other hand, cases may arise, in which the defendant, the appellant, has filed no answer, and yet his appearance in other modes and certain actions taken by him in the court below may prevent decrees rendered against him from being regarded as within the meaning of this statute decrees on bills taken for confessed entitling him to appeal therefrom, though he had made no motion in the court below to reverse or correct such decrees. Thus if the suit was to subject the real
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estate of a decedent to the payment of his debts, and the heirs filed no answer to the bill, but, after the case had been referred to a commissioner to ascertain the debts and assets of the estate, the heirs of the decedent were to appear and controvert certain debts sought to be proven before the commissioner not specified in the bill, but such debts were on the evidence allowed by the commissioner, and his action in the premises was excepted to by the heirs of the decedent, and their exceptions were overruled, and the commissioner's report confirmed, and a sale of the decedent's real estate ordered to be made to pay his debts as ascertained by such report, the heirs of the decedent could appeal from such decree, though they made no motion in the court below to reverse or correct it, as such decree ought not to be regarded as a decree on a bill taken for confessed, though it would have been so regarded, had no exception been taken to the commissioner's report. And not only is such a decree not regarded as based on the facts stated in the bill taken as confessed, but the exceptions filed by the heirs to the commissioner's report overruled by the court answer precisely the same purpose, as a motion to correct the decree, because it allowed such debts against the estate; and it would be idle to require such motion for such purpose to be made after the court had overruled such exceptions.

"So if in any chancery cause brought to have the defendant's land sold for any cause he filed no answer, and on the bill taken for confessed his land was decreed to be sold, and when it had been sold, the defendant appeared and by exceptions to the report of sale resisted the confirmation of the sale, because the land had not been properly advertised or for any other reason, and the defendant's exceptions were all overruled, and the sale confirmed by a decree of the court, such decree the defendant might appeal from because of errors in confirming such sale, though he made no motion in the court, after such decree was entered, to reverse it for these errors. For though, if he had made no exceptions or appearance, such a decree might have been regarded as a decree on a bill taken for confessed, yet, if he filed such exceptions, and they were overruled, it ought not to be regarded as a decree on a bill taken for confessed, because it was not based on any fact stated in the bill treated as confessed or admitted to be true by the defendant but on facts occurring after the filing of the bill set out in the commissioner's report, which facts were not treated by the court as confessed or admitted by the defendant but as controverted by him by his formal exceptions to such report, which exceptions after consideration were
overruled by the court. In such case it would be idle to require the defendant, after the decree confirming the sale had been entered, to move the court to reverse such decree for the reasons, which he had already in writing urged as reasons why such sale and report should not be confirmed.

"Other examples of like character might be put in illustration.

"The rule would seem to be, that, if the decree complained of in the Appellate Court is not based on any of the allegations of the bill taken as confessed but upon facts not appearing in the bill but introduced into the cause subsequently to the filing of the bill and in addition thereto it appears by the record, that the defendant, the appellant, though he has filed no answer, has appeared in the cause and expressly objected to the entering of the decree by the court on these new facts claimed to have been proven, then such decree ought not to be regarded as a decree on a bill taken for confessed, and no motion should be required to be made in the court below to correct or reverse such decree, before an appeal is allowed the defendant; for he has in fact done really the same thing in effect as making such motion, when he objected to the entering of such decree on such alleged facts."32

All this may seem a far cry from the purport of the statute, which speaks of "a decree on a bill taken for confessed." It will be noted that in some of the instances mentioned by the court where a decree may or may not be one on a bill taken for confessed, depending upon whether or not matters are contested by the defendant, the facts involved and the issues arising out of them which may be the subject of a confession are totally disconnected from the facts alleged in the bill. It may be a little difficult to see how a default as to such matters can operate as a confession of the bill. Rather, the result is to interpret and apply the statute as if it spoke of "a decree on matter taken for confessed;" or perhaps still more realistically, "a decree based on matter not contested;" instead of a decree on a bill taken for confessed.

32 Id. at pp. 560-563. The analysis is condensed in the syllabus. For some of the cases approving it in general and illustrating specific applications of it, see Dent v. Pickens, 61 W. Va. 488, 58 S.E. 1029 (1907); Lamp v. Locke, 89 W. Va. 138, 150-151, 108 S.E. 889 (1931); Yost v. O'Brien, 100 W. Va. 408, 411-412, 130 S.E. 442 (1925). In the Watson case it was held that, although the defendant had filed no plea or answer, and therefore was in default as to prior procedure, his motion for a new trial after a jury had returned a verdict on an issue out of chancery kept him from being in default as to matters disposed of by the verdict.
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Conceding that a judgment is by default or a decree is on a bill taken for confessed, still it cannot be reversed or corrected by motion in the trial court except for "error for which an appellate court might reverse it." This means that the judgment or decree must be one which is reviewable on a writ of error or an appeal in an appellate court.33

It is beyond the scope of this article to enter into a discussion of the various circumstances under which a judgment or decree may be reviewed in an appellate court; for instance, to inquire into the distinctions between interlocutory and final judgments and decrees; or how an interlocutory judgment or decree may be reviewed on a writ of error or an appeal from a final judgment or decree; or when an appealable judgment or decree may be reviewed on a writ of error or an appeal from a subsequent appealable judgment or decree;34 but it may be said, in general, that, with some statutory exceptions in the Code, a judgment to be reviewed on a writ of error must be a final judgment and a decree to be reviewed on an appeal must be a final decree or, under the statute,35 one adjudicating the principles of the cause. There are, of course, methods independent of the statute now under discussion for reversing or correcting in the trial court interlocutory judgments and decrees which have not been carried into final judgments or decrees. It may be noted that apparently a void judgment or decree, which has a peculiar status and may be described as a non-conformist in many phases of the procedural law, is not a judgment by default or a decree on a bill taken for confessed for purposes of the statute.36

Although the statute does not expressly so provide, it is essential under this section that the errors to be corrected on motion shall appear on the face of the record.37 This requirement results from the fact that only such errors may be reviewed on a writ of

33 It is said that the trial court in passing on the motion sits as an appellate court over its own judgment or decree. Citizens National Bank v. Dixon, 94 W. Va. 21, 29, 117 S.E. 689 (1923); Roush v. Seigrist, 119 W. Va. 712, 714, 197 S.E. 25 (1938).


error or an appeal from a default judgment or a decree on a bill taken for confessed. A practical test for determining whether the errors appear on the record is whether it is necessary to support the motion with affidavits or some other device exterior to the record in order to disclose the errors complained of. Such a necessity necessarily indicates that the errors do not appear on the record and are of such a nature that they must be reviewed by some other method than a motion under the statute; generally, by a motion for a new trial, in a common law action, and a bill of review or a petition for a rehearing in an equity suit.

While the errors to be reviewed must appear on the record, this does not mean that they must appear on the face of the judgment or the decree itself. The process has been held to be per se a part of the record in a case in which a default judgment is rendered, together with the return thereon. It is likewise a part of the record in an equity suit. So also, of course, are all the pleadings, both at law and in equity, all court orders and the proceedings at rules. Wherefore a default judgment or a decree on a bill taken for confessed may be reversed on motion because of substantial defects in the summons or in the return of service, and because of substantial defects in the declaration or bill. In the one instance, the motion, in effect, operates as a delayed motion to quash; in the the other instance, as a delayed demurrer.

ELECTION OF REMEDIES

The fourth section hereinbefore quoted is quoted here again for purposes of convenience.

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39 New Eagle Gas Coal Co. v. Burgess, 90 W. Va. 541, 111 S.E. 508 (1922). By W. Va. Acts 1949, c. 96, adding section 32 to art. 3, c. 56, W. Va. Code, the process is now a part of the record in all cases without craving oyer.

40 McKinley v. Queen, 125 W. Va. 619, 25 S.E. 2d 763 (1943).

41 White v. Toncray, 9 Leigh 347, 351 (Va. 1838).

42 Laidley's Adm'r's v. Bright's Adm'r, 17 W. Va. 779 (1881); Midkiff v. Lusher, 27 W. Va. 439 (1886); Lynch v. West, 63 W. Va. 571, 60 S.E. 606 (1909).

"No appeal, writ of error, or supersedeas shall be allowed or entertained by an appellate court or judge for any matter for which a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the court which rendered it, or the judge thereof, until such motion is made and overruled in whole or in part . . . "

It will be observed that this section, which covers motions under all prior sections in the article, forbids only an appellate court or judge to entertain an appeal, writ of error or supersedeas until the motion is made in the lower court and overruled in whole or in part. No restriction is placed on any power possessed by a trial court to review its judgments or decrees by a writ of error or otherwise. No limitation is put on use in the trial court of the writ of error coram nobis mentioned in the section quoted at the beginning of this article, because such a writ of error is not "allowed or entertained by an appellate court or judge." And, since that section itself places no limitation on resort to such a writ of error, merely providing that a judgment or decree may be reversed or corrected on motion, it would seem that a party in this state may still resort to this antiquated procedure for purposes of reversing or correcting a judgment because of clerical error or error of fact, the writ of error coram nobis and the statutory motion being concurrent remedies.

In an equity suit, under the equity practice, an appeal and a bill of review (which of course is filed and litigated in the lower court) are concurrent remedies for purposes of reviewing a final decree because of errors appearing on the face of the record. Under the statute, if the decree is on a bill taken for confessed, such errors may be corrected on motion and an appeal is not proper; but resort may still be had to a bill of review, the motion and the bill of review being concurrent remedies. If a motion is used, an appeal finally lies from the decree disposing of the motion; and if a bill of review is used, an appeal lies from the final decree on the bill of review. Likewise, a motion under the statute and a petition for a rehearing in an equity suit, which is a proceeding

45 See Campbell v. Hughes, 12 W. Va. 183, 211 (1877); King v. Burdett, 28 W. Va. 601, 609 (1886).
46 Meadow River Lumber Co. v. Smith, 121 W. Va. 14, 1 S.E.2d 169 (1939) and cases cited.
in the lower court analogous to a bill of review, are concurrent remedies.\footnote{47}

All these alternative methods of review, it will be observed, give the trial court the same opportunity to review its own judgments and decrees as a motion under the statutes, and hence are in harmony with the purpose of the statutes.

In cases where a common law or equity method of review in the lower court is not available, or, if available, is not resorted to, it is vitally important to determine whether the judgment or decree is of such a nature as to warrant resort to the statutory motion. The consequences of relying upon a motion when a writ of error or an appeal is the proper remedy, and of resorting to a writ of error or an appeal when a motion is proper, are equally disastrous. If a writ of error or an appeal is allowed when a motion should have been made in the lower court, the writ of error or appeal will be dismissed as improvidently awarded.\footnote{48} On the other hand, if a motion is improperly resorted to in lieu of a writ of error or an appeal, a judgment or decree sustaining the motion will be reversed in the appellate court merely because of error in resorting to the motion and the court will not inquire into the merits of the original judgment or decree.\footnote{49} The only recourse is, in the one instance, if it is not too late, to go back to the lower court and make the motion, a writ of error or an appeal lying upon the judgment or decree on the motion;\footnote{50} in the other instance, again if it is not too late, to seek a writ of error or an appeal on the original judgment or decree. The consequences of having pursued the wrong remedy might not have been so disastrous in the days when a party was allowed several years in which to make the motion or to seek appellate relief, and so had leeway in which to shift his strategy;\footnote{51} but now, when a limitation of eight months

\footnote{47} Shenandoah Valley National Bank v. Shirley, 26 W. Va. 563 (1885); Richmond v. Richmond, 62 W. Va. 206, 57 S.E. 736 (1907).


\footnote{49} Bell v. List, 6 W. Va. 469, 476 (1873); Stringer v. Anderson, 23 W. Va. 482, 486 (1884).

\footnote{50} Midkiff v. Lusher, 27 W. Va. 439 (1886); Morrison v. Leach, 55 W. Va. 126, 129, 47 S.E. 237 (1904).

\footnote{51} The motion and the appeal limitation periods, for obvious reasons,
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is prescribed in both instances, it will frequently be too late to resort to the proper remedy after having lost as a result of having pursued the wrong one. All this may suggest that, when in doubt, the wise course of action is to pursue both remedies at the same time, a strategy which will be observed to have been followed in some of the older cases. This strategy, however, under present conditions, has its limitations. In many cases, depending upon how late the motion is made after rendition of the judgment or decree, it may happen that the court will not act on the motion until the elapse of eight months after the rendition, in which event it would be too late to seek appellate relief by a writ of error or an appeal from the original judgment or decree.

THE PROCEDURE

"Every motion under this article shall be after reasonable notice to the opposite party, his agent or attorney, in fact or at law, and shall be within eight months from the date of the judgment or decree . . ."\(^{53}\)

Presumably, notice would be waived by appearance to the motion without objection to lack of notice, as process is waived by a general appearance to an action or suit; but no case has been observed where the question arose.\(^ {54}\)

It is said that, since the motion proceeding is a substitute for a writ of error or an appeal, it should substantially conform to the requisites of those remedies by way of specifying grounds of the motion, as specifications of error are brought before an appellate court in the petition for a writ of error or an appeal;\(^ {55}\) but there has been a difference of opinion as to where the grounds should be stated. Specifically, the point of controversy has been whether it is necessary to state the grounds in the notice.

\(^ {52}\) For many years prior to adoption of the Revised Code in 1931, each period was one year. Since 1931, the limitations have been eight months. W. VA. CODE c. 58, art. 2, § 9; id. c. 58, art. 5, § 4 (Michie, 1949).

\(^ {53}\) W. VA. CODE c. 58, art. 2, § 6 (Michie, 1949).

\(^ {54}\) In Moore v. Davis, 70 W. Va. 547, 74 S.E. 670 (1912), there was neither service of notice nor appearance. The court assumes that appearance would have dispensed with notice.

\(^ {55}\) Slingluff v. Gainer, 49 W. Va. 7, 13, 37 S.E. 771 (1901).
In the last case cited, a decree on a bill taken for confessed was rendered against a defendant. At a later term of court, he appeared and pursued a procedure which the court treated as a motion under the statute to reverse the decree, but in no way assigned any proper grounds to support the motion. Judge Brannan, speaking for the court, says "The invariable practice has been to specify the errors in the notice;" but he calls attention to the fact that there has been a conflict in the Virginia decisions as to the proper practice.

"In Gunn v. Turner, 21 Grat. 382, it is said that the notice must specify errors. This has, perhaps, been overruled in Saunders v. Griggs, 81 Va. 506, but, as 1 Barton's Law Practice 574, asserts, the former decision is clearly the better one."\footnote{At p. 13.}

Yet despite these observations indicating a preference for specification in the notice, the court states what presumably is intended to be the rule in this state in point three of the syllabus as follows.

"On a motion to reverse a decree by default, the errors must be specified in the notice of the motion, or on the record in the motion, or in a written assignment of errors filed as a part of the record."

Whether the methods here stated by the court are desirable alternatives should depend upon the object to be accomplished in requiring the errors to be specified. If the only purpose is to inform the court of the grounds of the motion, then it would seem that any one of the methods suggested would be adequate; but if notification of the opposite party before argument of the motion is also an object, then specification in the notice would seem to be necessary, unless the written assignment of errors mentioned above should be served on the party, which does not seem to be contemplated. Perhaps, after all, since, as Judge Brannan suggests, the invariable practice in this state has been to specify the errors in the notice, the more important question is not where they should be stated, but how they must be stated; that is, how specifically must the errors be indicated, a question having particular significance in one field of error to which the motion applies.

\footnote{Id.}
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Perhaps the most frequent ground urged for reversal of a default judgment or a decree on a bill taken for confessed is error in the declaration or bill. As heretofore suggested, a motion based on such a ground is in effect a delayed demurrer. Just as it is said that the motion procedure, since it is a substitute for a writ of error or an appeal, should conform to the essentials of those remedies; so it may be said that, to the extent that it functions as a substitute for a demurrer, it should embody the essential features of a demurrer. Prior to adoption of the Revised Code in 1931, it was necessary to state in a demurrer to a declaration or bill only that the declaration or bill was insufficient in law.\(^5\) Perhaps significantly in that state of the law, it was held that the notice of a motion to reverse a decree on a bill taken for confessed, because of errors in the bill, need state only the general ground that the bill was insufficient; in other words, need conform only to the requirements of a general demurrer.\(^6\) However sound this decision may have been at the time when it was rendered, it would not seem to be in harmony with the present state of the law.

All demurrers now must state specific grounds;\(^7\) which means, of course, that, if the demurrer is directed at a declaration or bill, it must specify the errors relied upon to show that the declaration or bill is insufficient. Clearly this is for the benefit of the demurrer, in order that he may prepare in advance for argument of the demurrer. For the same reason, one who must meet a motion based on insufficiency of a pleading should be entitled to advance notice of the specific grounds of the motion. If such a requirement needs any further justification, it may be suggested that the party making the motion is in effect a delinquent demurrant, and therefore is entitled to avoid none of the consequences of a normal demurrer through his dilatoriness. What may be considered a badge of this delinquency is the fact that a party making the motion may be required to give security for costs accrued and to accrue before his motion will be entertained.\(^8\)

\(^5\) W. Va. Code c. 125, § 28 (Barnes, 1923).
\(^6\) Morgan v. Ice, 80 W. Va. 273, 92 S.E. 340 (1917). Quaere: Would this have constituted a sufficient assignment of error on an appeal, the standard, as heretofore noted, for assignment of grounds on the motion?
\(^7\) W. Va. Code c. 56, art. 4, § 36 (Michie, 1949).
CONCLUSION

It is frequently said in the decisions, referring collectively to the sections under discussion, that their purpose is to give the trial court an opportunity to correct error in its own judgments and decrees, and so to dispense with the necessity of resorting to an appellate court. Such statements are true as applied to the section dealing with judgments by default and decrees on bills taken for confessed, but require qualification as applied to the other two sections. Such is not at all the object intended to be accomplished by the section which permits a motion in lieu of a writ of error coram nobis. As heretofore observed, this writ of error does not issue from an appellate court and contemplates no review in an appellate court. Hence the object of the statute is not to dispense with appellate review, but to provide a method of review in the lower court as an alternative substitute for the antiquated writ of error coram nobis. Such statements are only partly true of the other section dealing with clerical error. While one of its purposes may be to dispense with a writ of error or an appeal, perhaps its primary object is to prescribe a method for making corrections.