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Process--Defects--Objections and Waiver

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PROCESS—DEFECTS—OBJECTIONS AND WAIVER.—In an action of debt on a city policeman's bond, the writ failed to state the amount of damages. *D* moved that the writ be quashed and *P* was permitted to amend, over *D*'s objection, by inserting the amount of damages. The cause proceeded to judgment in favor of *P*, and *D* appealed. *Held*, that the omission rendered the writ defective, but not void, that the motion to quash was proper since the defect appeared on the face of the writ, and that *D* did not waive his objection by pleading to the merits. *Town of Camden on Gauley v. O'Brien*, 79 S.E.2d 74 (W. Va. 1953).

W. VA. CODE c. 56, art. 4, § 30 (Michie, 1949) stipulates that, in cases other than those involving misnomers, ". . . a defendant on whom process . . . appears to have been served shall not take advantage of any defect in the writ or return . . . unless such defect . . . be pleaded in abatement. And in the case of every such defect . . . whether the same shall be pleaded in abatement or not, the court may at any time permit the plaintiff to amend the writ . . . upon such terms as to it shall seem just. But nothing herein shall deprive a defendant of any right which he has by the common law to make a motion to quash process *which is void;* and if the process be a void process, the suit or action shall be dismissed upon motion of the defendant." (Emphasis supplied.) The Reviser's Note to that section explains that the last sentence was inserted to codify the judicial construction adopted in such cases as *Coda v. Thompson*, 39 W. Va. 67, 19 S.E. 548 (1894), and *Fisher v. Crowley*, 57 W. Va. 312, 50 S.E. 422 ((1905). Prior to the revision, there might have been, but probably was not, sufficient ambiguity in the section as it then stood [W. VA. CODE c. 125, § 15 (Barnes, 1923)] to explain the decision in *Laidley's Adm'rs v. Bright's Admr's*, 17 W. Va. 779 (1881), wherein a motion to quash was entertained to reach a defect apparent on the face of the process, although the process itself was merely voidable, not void. See Carlin, *Methods of Objecting to Process*, 29 W. VA. L.Q. 229 (1923). Since the revision, however, the legislative intent would seem to be difficult to misinterpret. As was succintly and correctly observed in *Hall v. Ocean Accident & Guarantee Corp.*, 122 W. Va. 188, 191-2, 9 S.E.2d 45, 47 (1940), "Code, 56-4-30 makes a sharp distinction in the practice regarding process which is merely defective, and process which is void. Under that statute, a defendant can take advantage of *a defect* in the writ or return only by plea in abatement; but the statute preserves his common law right to move to quash *a void* process. Upon the motion, however, the court will consider only

the record itself." (Emphasis by the court.) Under the construction adopted in that case, the writ would be quashed only if the defect appeared on the face of the writ and the defect was so substantial as to render the writ void. The *Hall* case was cited in the principal case but was not distinguished, so that now, apparently, the rule has been changed.

Assuming that the motion to quash should have been sustained but was overruled, with an exception duly saved, did *D* waive his objection by proceeding to trial upon the merits? This question was answered in the negative in the principal case, although it has not always been so answered in this state. See Carlin, *A Decade of Pleading, Practice and Procedure,* 53 W. VA L. REV. 1 (1950). In fact, in the recent case of *Stone v. Rudolph,* 127 W. Va. 335, 340, 32 S.E.2d 742, 745 (1944), not alluded to in the principal case, the court observed that ". . . whatever the rule may have been at one time, we think it clear that, as the law now is, a general appearance after a plea or motion attacking the form of, or the return of service of process waives any defect in the process or the service thereof, on the general theory that the office of a process is to bring a defendant into court and give him notice of the proceeding; and while he may appear specially to attack the form of return of service thereof, he cannot afterwards appear generally for any purpose without a waiver of his objections thereto."

There is little quarrel with the application of the rules enunciated in the principal case but there are serious doubts concerning the advisability of the changes in interpretation which are effected by this decision. Since procedural rules are only a means to an end, it is especially important that their construction not be changed in the absence of a pressing need therefor.

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VENUE—NONRESIDENT MOTORIST STATUTE.—*P* brought an action based on an alleged collision between *P*'s motor vehicle and a motor vehicle owned by *D* foreign corporation and driven by nonresident *D* as an employee of *D* corporation. *Held,* that the venue of the action was in the county in which the collision occurred, and that the statute, providing that operation by nonresidents of motor vehicles upon public roads of this state is equivalent to appointment of the state auditor to be the nonresident's attorney upon whom process may be served in an action against the nonresident growing out of an accident or collision in the state, did not author-