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Form of the Original Writ in West Virginia

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strongly against its author.¹² Its use alone has led to reversals.¹³ Thus, the user of this "thing" faces not only the frowns of the courts but also the distinct possibility of creating a two-edged sword which may be turned against himself.

FORM OF THE ORIGINAL WRIT IN WEST VIRGINIA

A recent survey discloses that in thirty-three counties in West Virginia the original writ returnable to rules cites the defendant "to appear *before the Judge* [italics ours] of our Circuit Court at Rules to be held in the Clerk's Office of the said Court on the first Monday in to answer"¹ The citation to appear "before the judge" in writs returnable to rules and in writs returnable to the court during term has long been in use in both Virginia and West Virginia, but the propriety of the phrase has apparently never been questioned. Judge Green in *Kyles v. Ford*, an early Virginia case, noticed the phrase and, in passing, said, "The requisition to appear before the Judge is, I presume, common to writs returnable to the first day of the Court, and to the rule-day. In the latter case, there is no occasion to drop this mandate"² The last sentence of this quotation may well be questioned. Though such writs are probably not assailable under our statute³ providing that the forms of writs "may be as heretofore used", the phrase when used in writs returnable to rules has not enjoyed such immunity in at least one jurisdiction. In North Carolina the court held voidable, but capable of amendment, a writ citing the defendants "to be and appear before the judge of our Superior Court and

¹² *Bobrow v. United States Casualty Co.*, *supra* n. 9; *Employers' Mut. Liability Ins. Co. v. Tollefsen*, *supra* n. 6.

¹³ *Cronin v. Crooks*, 143 N. Y. 352, 38 N. E. 268 (1894); *Putnam v. Industrial Comm.*, 80 Utah 187, 14 P. (2d) 973 (1932).

¹ Taken from the form used in Logan County. Substantially the same form is also used in the following counties: Barbour, Boone, Cabell, Calhoun, Clay, Doddridge, Fayette, Greenbrier, Harrison, Jackson, Kanawha, Lincoln, Mason, Mingo, Monongalia, Monroe, Nicholas, Pendleton, Pleasants, Pocahontas, Putnam, Randolph, Ritchie, Roane, Summers, Taylor, Tyler, Upshur, Wayne, Wetzell, Wood and Wyoming. In Marion and Webster counties the defendant is cited to appear before the Circuit Court at rules. This is as misleading, if not more so, as the writs under scrutiny.

² 2 Rand. 1 (Va. 1823).

³ W. VA. REV. CODE (1931) c. 56, art. 3, § 3;

answer the complaint and petition which will be deposited in the office of the Clerk of the Superior Court'⁴ The court said, "To the extent that it cited the defendants to appear before the judge it was misleading."

That the phrase is misleading and inaccurate when used in writs returnable to rules is apparent upon a moment's reflection because the judge's presence at rules is a pure fiction, — for he is infrequently, if ever, physically present in the clerk's office and there is nought to compel him to be there. In circuits composed of more than one county, the judge's presence at rules in all the various counties of the circuit is an obvious impossibility. It is certainly not intended that such writs should order appearance before the judge, yet the words are in the writ and, taken literally, make such an appearance a condition precedent to the defendant answering the declaration or bill. A defendant who presents himself at the clerk's office on the return day and, upon learning that the judge will not be there during rules, leaves, has literally complied with the order of the writ, yet he incurs the penalties of non-appearance. In the Virginia case of *Raub v. Otterback*⁵ there was a writ of *scire facias*, purportedly returnable to rules, summoning the defendants to appear "before the of our said circuit court'. The court in quashing the writ for that and other reasons⁶ said that the phrase was "meaningless". If the word "judge" had been inserted in the blank, would it not still have been meaningless?

In the interest of clarifying the law and abolishing a useless and misleading fiction, would it not be appropriate for the Supreme Court of Appeals of West Virginia to exercise its statutory power⁷ to prescribe the forms of writs and eliminate this fiction?⁸

⁴ *Piercy v. Watson*, 118 N. C. 976, 978, 24 S. E. 659 (1896).

⁵ 89 Va. 645, 16 S. E. 933 (1893).

⁶ Besides the defect above noted, the writ was also returnable to a day not a rule day, but the court apparently based its decision on both grounds. Since a writ returnable to rules to a day not a rule day is void, *quacre* if the failure alone to fill up the blank would have rendered the writ void.

⁷ W. VA. REV. CODE (1931) c. 56, art. 3, § 3.

⁸ The following form is submitted as one more consonant with the facts:

STATE OF WEST VIRGINIA,

To the Sheriff of.....County, Greetings:

You are hereby commanded in the name of the State of West Virginia to summon.....(name defendants).....if he (or they) be found in your county, to appear at the Clerk's Office of the Circuit Court for.....County, at Rules to be held for the said Court on the first (or last) Monday in.....(month)....., 19....., to