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METHODS OF OBJECTING TO PROCESS AND AMENDMENT THEREOF IN WEST VIRGINIA

By Leo Carlin.*

This discussion is undertaken with no small measure of apprehension as to whether the writer will be able to make it worth while. What is to be said, it is feared, may fall largely within opposite extremes: the one subject to the criticism of dealing too much with the commonplaces of routine practice; the other open to the accusation of wandering too far into the field of speculation. However, the comparatively few and brief, but far from simple, statutory provisions involved seem peculiarly susceptible to superficial construction. It is believed that not a few of the local decisions, even when properly applying the law to the particular facts of the case, have been guilty of indulging in a delusive generality of statement that needs qualification. Furthermore, it would seem that the results obtained in all instances from actual adjudication have not been entirely harmonious. It is hoped that something of value may be accomplished, if in no other way, at least by calling attention to some of the difficulties involved.

METHODS OF OBJECTING TO PROCESS.

At common law, generally, depending upon the circumstances of the case, two different methods of objecting to the sufficiency of

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original process are prescribed: (1) a motion to quash, and (2) a plea in abatement.1 These two methods of attack will be recognized as analogous, respectively, to a demurrer and to a plea in bar to the declaration. A motion to quash, of course, is proper when the defect appears wholly on the face of the writ.2 Likewise, since on a motion to quash the court may look to the declaration, which is a part of the record, an inconsistency between the writ and the declaration—technically, a variance—may, it is said, be made the basis of a motion to quash;3 and, since the defect also involves the declaration, a demurrer is held to be proper. Professor Minor says:

"By the common law a variance between the writ and the declaration might have been taken advantage of by plea in abatement, or by special demurrer, if the variance were merely formal; but if it were material to the merits, not only by those two means, but also by general demurrer, motion in arrest of judgment, or by writ of error."4

In all instances where a motion to quash is made, since the writ per se is not a part of the record, it is necessary, as a prerequisite to making the motion, to have oyer of the writ in order to make it a part of the record.5 Other matters of defect, which are extraneous to the writ, of course can be brought to the attention of the court only by a plea in abatement.6 Here, again, the defendant should have oyer of the writ and a copy of the writ should be inserted in the plea.7 Thus, it will be seen that the methods of objecting to process at common law and the matter of determining the proper method in any particular instance are comparatively definite and simple.

However, it would appear that this simplicity in the procedure has existed to some extent at the expense of certain hardships imposed upon the plaintiff. Both the motion to quash and the plea in abatement at common law were frequently subject to this

1 21 R. C. L. § 71; 21 STAND. PROC. 70.
2 Idem.
4 4 Minor, INST. PROCS., 609-610.
5 "But the writ can only be inspected (in order to reverse the proceedings), when it has been made a part of the record, by craving oyer of it; and oyer is not demandable after an Impairment, nor after a plea in abatement, nor a fortiori, after a peremptory plea. (Com. Dig. Pleading, (p. 2.).)
6 "If the variance be immaterial to the real merits, it must at common law be taken advantage of by plea in abatement, or by a special demurrer; but if it be a variance in substance, the party, provided he has put the writ into the record, by craving oyer of it in time, may avail himself of it by motion in arrest of judgment, or by writ of error, as well as by general demurrer." Idem. 1049.
7 See note 1, supra.
criticism. Actions were abated by plea for defects that were more or less trivial, unwarranted delay being the result. Not only was process quashed on motion for matters of little consequence, but, since a motion to quash could not be heard until a term of court came on, the latter method of objecting added extra delay to the inconvenience of suing out a new writ. As a result, came the enactment of two sections of the West Virginia Code, which read as follows:

"No plea in abatement for a misnomer shall be allowed in any action; but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration and summons may, on the motion of either party, and on the affidavit of the right name, be amended by inserting the same therein.

"In other cases, the defendant on whom the process summoning him to answer, appears to have been served, shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the plaintiff to amend the writ or declaration so as to correct the variance, and permit the return to be amended, upon such terms as to it shall seem just."

The effect of these statutory provisions, as will readily appear, is far-reaching. It should be noted, however, that the method of making a motion to quash or of pleading in abatement has not been changed; and that the statute merely undertakes to prohibit the use of a motion to quash or of a plea in abatement in certain instances wherein they were respectively permissible at common law. Hence, when a motion to quash a writ is made, it is still necessary, as at common law, to have oyer of the writ. Likewise, when a plea in abatement is filed to the writ it would still seem to be necessary to have oyer of the writ and to copy it into the plea, although such a requirement has been criticised as technical and the court has intimated that it might be dispensed with.

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8 See Anderson v. Lewis, note 3, supra.
9 W. Va. Comp. c. 125 §§ 14, 15.
10 Lambert v. Ensign Manufacturing Co., 42 W. Va. 313, 26 S. E. 431 (1899), and cases cited.
12 In Nettier-Oppenheimer & Co. v. Elfant, 63 W. Va. 99, 102, 59 S. E. 892 (1907), Brannon, J., says: "I have some doubt whether this plea should not incorporate a demand of oyer in its opening, and then put its averment. Technically I think so. Form 203 4 Minor. Oyer is a demand to have read what is not a part of the record, and thus present it, and thus enable one to plead. Stephen on Plead. 38. The rule book should show oyer and then the plea in abatement. But this is technical, as the record shows both plea and oyer, and they go together."

The last sentence evidently alludes to the fact that oyer of the writ had already been had as incidental to a motion to quash the writ and that this oyer may also
As to the necessity of oyer, it is worth mentioning that a distinction may be made between a motion to quash and a plea in abatement. The latter sets forth the essentials of the writ in its allegations, and hence the court, without referring to a copy of the writ obtained by oyer, may be informed as to the substance of the writ constituting the variance or other defect by referring to the allegations of the plea. However, it is believed to be the better and safer practice to have oyer of the writ and to insert a literal copy of the writ in the plea in all instances where a plea in abatement is filed to the writ.

As to the instances, since the enactment of the statute, in which a plea in abatement to the writ may be filed, it may be said briefly that a plea in abatement under the statute is still proper in all instances in which it was proper at common law, except in the single case of a misnomer. A misnomer was pleadable in abatement at common law; but under the statute, all that the defendant can do in the case of a misnomer in the writ is to make a motion to amend the writ, and, on making such motion, he is compelled to disclose by affidavit information which will give the plaintiff a better writ, the affidavit in this respect acting as a substitute for a plea in abatement, and the plaintiff getting a better writ by amending the defective one instead of suing out a new one.

It results from what has been said that the principal effect of the statute is to reduce the number of instances in which at common law a motion might be made to quash the writ; and it will be noted that the process by which this reduction takes place is to require a plea in abatement in certain instances where at common law a motion to quash or a demurrer was proper. Since a plea in abatement must be filed at rules and a motion to quash can only be made in court, the policy of the law in requiring these additional matters to be pleaded in abatement clearly is to compel the defendant to raise the objection at the earliest convenient stage of the procedure, and thus to give the plaintiff an early opportunity either to amend or to sue out a new writ, or else to place the defendant in the position of having waived all right to object. If such be not the object and effect of the statute, it would seem to be worse than useless; for it certainly tends to in-
roduce confusion into matters that were reasonably clear and definite at common law. The result is that, while the field of pleas in abatement has been impoverished in the single case of a misnomer, it has been enriched to the extent that it has been made to cover exclusively a large part of the field open at common law to motions to quash. The effect of the statute in the latter respect, it is believed, may best be considered by dividing all defects in the writ, other than misnomers, into two classes: (1) variances between the writ and the declaration; and (2) other defects in the writ, or defects within the writ itself.

It is frequently said, loosely, and perhaps thoughtlessly, that under the statute no objection can be made on account of a variance between the writ and the declaration except by a plea in abatement. That the plain language of the statute does not warrant such a broad statement may easily be demonstrated. Confining a quotation of the statute to the language applying to a variance between the writ and the declaration, it reads as follows:

"The defendant on whom the process summoning him to answer, appears to have been served," shall not take advantage of .... any variance in the writ from the declaration, unless the same be pleaded in abatement."

If the words in the statute in italics had been omitted, then the general statement that the defendant must in all instances plead in abatement in order to object to a variance between the writ and the declaration would have been true; but the effect of the statute with these words in it is that the defendant is compelled to plead in abatement as to such a variance only when he "appears to have been served." The full significance of the phrase, "appears to have been served," will receive consideration hereinafter. It will suffice to say here that the general legislative intent permeating the phrase, as well as the residue of the statute, is that a defendant should not be required to plead in abatement as to any defect in a writ unless it shall appear that he has knowledge of the existence of a writ with reference to which he can intelligently adopt some mode of procedure. In fact, it must be conceded that the statute goes very far when it confines the defend-

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14 See point two of the syllabus in Snyder v. Philadelphia Co., note 7 supra; point one of the syllabus in Anderson v. Lewis, note 3 supra; Hogg, Pleading and Forms, 69. The rule is correctly stated in point one of the syllabus in Swindell v. Harper, 61 W. Va. 381, 41 S. E. 117 (1902). In the instances noted, and likely in other instances where the rule is stated too broadly, the context will indicate that the true rule was understood and properly applied in the general discussion.

15 Italics ours.

16 See Anderson v. Lewis, note 3 supra, p. 289.
tant to a plea in abatement even in those instances where he appears to have been served. Neither the words of the statute nor, it would seem, its spirit and intent, make any distinction between matters of substance and matters of mere form. If, in the absence of a plea in abatement, the statute permits the declaration to vary from the writ in one substantial particular, why not in another? Under the operation of the statute, does the process give the defendant any notice upon which he can safely rely, except to tell him that he has been sued and when and where he can acquaint himself with the particulars? If this question be answered wholly or partly in the negative, may it not be seriously considered whether the process could be made less deceptive by eliminating some of its present contents?

As to defects apparent upon the face of the writ itself, the statute reads as follows:

"The defendant on whom the process summoning him to answer, appears to have been served, shall not take advantage of any defect in the writ or return . . . . . unless the same be pleaded in abatement."

The broad and literal effect of this latter provision of the statute would seem to be to compel the defendant to resort to a plea in abatement in all instances for the purpose of objecting to defects within the writ, except in those instances where it shall not appear that the defendant has been served. The reason for the exception stated in the statute as to defendants who do not appear to have been served has already been noted. The question whether the defendant "appears to have been served," of course, must be answered in the first instance by the return of service. In all cases where the return of service is sufficient, it would seem to follow that the defendant must appear to have been served. Hence the conclusion may be drawn that the statute compels the defendant to plead in abatement in order to take advantage of defects in process in all instances where the return of service is good, and that he still has his common-law right to make a motion to quash only in those cases where the return appears to be bad. The extent to which this conclusion must be modified will receive attention hereinafter. However, it is conceivable that if the defendant should attack the truth of a return which is regular on its face and show

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17 See Richmond & D. R. R. Co. v. Rudd, 88 Va. 648, 14 S. E. 361 (1892).
it to be false, as he may do under authority of a recent decision,\textsuperscript{18} he might then go back of the return and make a motion to quash the writ, if defective, on the ground that it did not then appear that he had been served.\textsuperscript{19} To summarize, it may be said that the defendant, when the return is bad, still has all the privileges which he had at common law (1) to make a motion to quash the return itself and (2) to make a motion to quash the writ, if defective. However, in order to save the right to the defendant to carry a motion to quash back of a defective return, the return must be bad in substance; for the return itself, if merely formally defective, is not subject to a motion to quash.\textsuperscript{20}

It has already been said that, if the return of service is bad in substance, since it will not appear that the defendant has been served, by the plain terms of the statute the defendant has all his common-law rights to make a motion to quash; that not only may he move to quash the bad return, but has the privilege of going back of the return and moving to quash the writ itself, if defective. However, the fact that the return is bad does not establish irrevocably that the service was bad. It is familiar law that the utmost liberality is exercised in granting leave to amend defective returns at any stage of the procedure when the service has been sufficient. Let it be supposed that the process and the return are both substantially defective. Under the statute, the defendant still has his common-law right to make a motion to quash the writ. But further let it be understood that the service was good and that the plaintiff avails himself of the right to amend the return. Should the defendant, after the return has been amended, still have a right to move to to quash the writ? The originally defective

\textsuperscript{18} Nuttallburg Smokeless Fuel Co. v. First National Bank of Harrisville, 89 W. Va. 438, 108 S. E. 766 (1921). The latter case holds, contrary to previous decisions, that an officer's return of service on process may be contradicted. It has been familiar law for some time that a return of service made by a private person may be contradicted. Peck v. Chambers, 44 W. Va. 270, 28 S. E. 705 (1897).

\textsuperscript{19} If the truth of the return should be attacked by a plea in abatement, as it seemingly could within proper time limits, and the defendant should contemplate thereafter making a motion to quash the writ for defects therein, it would seem prudent for the defendant to have oyer of the writ for the purpose of making his motion to quash before pleading in abatement. This is suggested on authority of the statement made by Professor Minor to the effect that it is too late to have oyer of the writ after a plea in abatement. See note 5 supra.

\textsuperscript{20} Barkdale v. Neal, 18 Grat. 314 (Va. 1862).

Of course, if the return of service on process be quashed, the writ itself can not be re-served, because its return day has expired; and, unless the plaintiff shall cause an alias writ to be sued out, the original writ will be quashed and the action abated. Hence it might be concluded that, if the return be bad, the question whether the writ can be quashed for defects in it is unimportant. Such, however, is not always the case. It may often be advantageous for the plaintiff to sue out an alias rather than a new original writ, as in situations involving the pendancy of an action to support an attachment, Oil and Gas Well Supply Co. v. Gartlan, 52 W. Va. 267, 52 S. E. 524 (1905); or in fixing the bar of the statute of limitations, Carter Coal Co. v. Bates, 127 Va. 586, 105 S. E. 76 (1920). It should be remembered that an alias or pluries writ stands or falls with the original. Gorman v. Stead, 1 W. Va. 1 (1884).
return left open the door for a motion to quash the writ. Does the amendment of the return close the door? The intent and spirit of the statute would seem to say that it does. Seemingly, if the defendant knows of the existence of the defective process, it is the purpose of the statute to compel him either to plead in abatement or to waive his objection. The originally defective return indicated that he did not know of the existence of the writ; but the fact is that he did know of its existence and the amended return shows that he had such knowledge. To let him come into court under such circumstances and move to quash the writ, and to sustain his motion after the return has been amended, would be to permit him to impose upon the plaintiff the very delay and inconvenience which the statute intended to avoid. Hence it is believed that, although the defendant may properly make a motion to quash the writ when the return is bad, he can not prevail on such motion if the return be amended so as to show that he has been properly served.  

What has been said may be taken as leading to the conclusion that, under the statute, all writs, however defective, will, under all circumstances, be protected from a motion to quash by a good return of service; but such has not been the judicial construction placed upon the statute. For instance, it has been decided that, regardless of the fact that the defendant may appear to have been served, a writ which is made returnable more than ninety days from date may be quashed on motion.  

Likewise, a writ which fails to indicate when and where the defendant is to appear; and a writ which, in violation of the statute, is directed to a wrong county, provided the defect is apparent on the face of the writ, may be quashed on motion. Such decisions may be sustained, and seemingly are sustained, on the theory that, since the defect renders the writ utterly void, it can not be said, under the very terms of the statute, that “process summoning him to answer appears to have been served” upon the defendant. Nor is it illogical to

22 Coda v. Thompson, 39 W. Va. 67, 19 S. E. 549 (1894); Kyles v. Ford, 2 Rand. 1 (Va. 1823).  
The same may be true as to violations of other positive statutory or constitutional requirements. But it is believed that process directed to a disqualified officer is not merely because of this fact alone, void, although such seems to have been the view of the court in Hansford v. Tate, 61 W. Va. 207, 56 S. E. 372 (1907). It is submitted that the true basis of this decision is the fact that the process was served by the deputy of the disqualified sheriff.  
conclude that, if what purports to be process is so defective that it cannot properly be considered as process, there is no process in the case. Hence, under the liberal terms of the statute, in such an event, it cannot be said that the defendant "appears to have been served." The defendant may have been served with a paper, but not with process.

While the rationale of the decisions cited above may be accepted as logical, and the results may be justified in these and other particular instances, still it must be conceded that the chief remedial effect of the statute can be placed in jeopardy by an indiscriminate application of the principle involved. In order to entertain a motion to quash, in spite of the statute, it is necessary only to decide that the process is void, while it may have been the intention of the statute to prevent the court from considering the defect claimed to make it void except under a plea in abatement. In other words, on the theory that the statute does not apply to void process, it is always possible to measure the propriety of the method of objecting in terms of the defective subject matter of the objection. The danger lies in letting the nature of the defect control the method of objecting, which may not have been the intention of the statute.

Since the decisions justify a rule to the effect that a defendant may still, under the statute, make a motion to quash when the writ is void, it is desirable, if possible, to define the meaning of the term "void." This term, as applied to process, has been used by the courts with much lack of precision. In some instances it is taken to mean merely that the process can not be amended, and will be quashed if seasonably attacked, although it does not necessarily mean that the process, even in its defective condition, will be insufficient to support a judgment. In other instances, it means that what purports to be process is so defective that it can not be looked upon as process under any circumstances or for any purpose. That the possibility of amendment is not, in all cases, a proper test as to whether the process is utterly void will appear more fully later under the discussion of amendment of process. Of course, utterly void process, like anything else that is utterly void, can not be amended. But recognition by the West Virginia decisions of the fact that process may be merely voidable and yet can not be amended, because to do so would falsify the officer's

26 See Ambler v. Leach, 15 W. Va. 677 (1879); 32 Cyc. 518-519.
27 Ambler v. Leach, supra.
return,\textsuperscript{28} is a sufficient indication that lack of amendability is not an absolute criterion as to true voidness. A more consistent, although perhaps not very helpful,\textsuperscript{29} test would be whether the defective process would be sufficient to support a default judgment. However, it is doubtful whether such a test could be reconciled with views expressed in the West Virginia decisions.\textsuperscript{30} Perhaps after all it will be safer not to go too far in generalization and to leave the field of construction open for each case as it shall arise, bearing in mind that the statute should not be so construed as to destroy its usefulness. It would seem that the court is correct in holding void any process that fails reasonably to notify the defendant when or where he is to appear. He should know where to go when summoned and should not be compelled to camp in the clerk's office in order to discover when or where he will have an opportunity to examine the declaration. There may be more doubt as to declaring process void merely because it is made returnable beyond the period of time fixed by the statute, the defendant in such cases nevertheless having definite notice, and yet such a rule is not without strong reasons to support it. One reason is the mere fact that the statute says that process shall not be made so returnable. The fact that failure to comply with some definite statutory limitation may lead to intolerable abuses is sufficient to suggest that the defendant should be granted the broadest opportunity to object. If any measure of chance should be offered to the plaintiff to escape the limitation imposed by the statute, what would prevent him from making his process returnable even years from date, and thus keeping the defendant an unreasonable length of time in suspense? Again, the fact that amendment of such process after service would lead to an absurdity is worthy of consideration. The remaining instance heretofore noted where the court has held process to be void is believed to be based on sound logic. The policy of the law in limiting the direction of process to certain counties is to prevent the plaintiff from dragging the defendant into other counties for purposes of litigation. Although the defendant may unavoidably find it necessary ultimately to appear in opposition to the course of litigation instituted by process directed to the wrong county, still it would seem that he

\textsuperscript{28} Laidley's Admr. v. Bright's Admr., 17 W. Va. 779 (1881).

\textsuperscript{29} "It is said that only those [defects] which affect the jurisdiction will render the writ void; but this determines little, for the question still arises, what defects affect the jurisdiction. The matter seems to be largely one of precedent rather than one of principle." 32 Cyc. 518-519.

should have the broadest liberty of electing as to when he will appear. If he should be compelled to appear *in limine* and plead the matter in abatement, as he might if the process were held merely voidable, he would thus be subjected to the very inconvenience intended to be obviated by the statute.

Conceding the difficulty of attempting to formulate a general and absolute definition of void process that will serve as a rule of procedure, yet it is believed that, in order to arrive at a construction of the statute that will harmonize the operation of all its details, it will be found necessary to recognize the potential existence of three different classes of defects: (1) formal defects; (2) substantial defects which at common law made the process voidable but not void, and which will still make the process voidable under the statute by a plea in abatement unless the process be amended; and (3) substantial defects which make the process void both at common law and under the statute. In construing the statute, it would seem to be necessary to recognize that merely voidable process is yet process. If it should appear that the defendant has been served with process substantially defective, but merely voidable and not void, still, in the language of the statute, it will appear that "process summoning him to answer appears to have been served" upon him; and the language of the statute requires that objection to such defects be asserted by a plea in abatement, or else waived. There would seem to be no way to escape this conclusion except to come forward with a proposition to the effect that any defect which has been recognized as substantial at common law will render the process void for the purpose of determining whether, under the statute, "process summoning him to answer appears to have been served" upon the defendant. If this be true, then the statute, with all its radical effect in regard to variances between the writ and the declaration, has no effect at all upon defects within the writ, except mere formal defects, regardless of the fact that a variance between the writ and the declaration offers greater opportunity for real deception than the majority of substantial defects within the writ itself.

It must be conceded, however, that the construction contended for above does not seem to have been followed by the court. Regardless of the statute, the court has entertained a motion to quash process, although the process itself was conceded to be merely voidable and not void, and the regularity of the return indicated that the process had been served. In the particular case in ques-
tion, the clerk had failed to sign the process. The defendant suffered a default judgment and later made a motion under chapter 134 of the Code to set aside the judgment and quash the writ because of this omission. In sustaining the motion, the court recognized the fact that the defect made the writ merely voidable and not void, and hence that the judgment could not have been attacked collaterally, and could not have been attacked directly if the period within which the defendant was entitled to make a motion under chapter 134 of the code had expired. Hence the process was not void and, although voidable, was still process. Otherwise, the judgment would have been void for any and all time. Since there was process and the defendant appeared to have been served with it, how is it possible to escape the language of the statute which says that, in order to object in such a case, the defendant must plead in abatement? Can any distinction, based on the words or the spirit of the statute, be made between a motion to quash under chapter 134 of the Code and a similar motion before judgment has been entered? It is submitted that there is nothing in section 15 of chapter 125 of the Code which will warrant such a distinction. It would seem that the basic purpose of the statute would indicate a contrary conclusion. If the defendant can gain anything through his delinquency in remaining silent and staying out of court beyond the normal time allotted to him to plead, it must come, if at all, through chapter 134, which, it must be admitted, has extended no small measure of kindly indulgence to delinquent defendants. For instance, West Virginia practitioners must have long observed that the latter chapter has been so construed as to give a defendant, merely by virtue of staying out of court and keeping the plaintiff in the dark, an extra year after judgment in which to demur to a declaration, in spite of the fact that other provisions of the same chapter would seem to say that objections to a pleading are waived unless asserted by demurrer before the entry of judgment. That there is a similar tendency to look upon chapter 134 as qualifying the restrictive force of other statutes placing limitations upon objections to process, is indicated by the language of the decision last cited:

"When a judgement is obtained by default, the statute of jec-
-fails has no effect on such judgment, and the Appellate Court will look into the writ and all the other proceedings." ~

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31 Laidley's Admr. v. Bright's Admr., notes 28 and 30 supra.
32 Town of Point Pleasant v. Greenie, note 30 supra; Ambler v. Leach, note 28 supra.
33 See similar statements as to the writ being a part of the record when the judg-
Does this statement warrant the inference that section 15 of chapter 125 is a part of the statute of jeofails? Suppose that the court may look into the writ when the judgment is by default. So may it upon oyer of the writ and a motion to quash before judgment, but the conclusion does not follow that a motion to quash is proper. Is it to be inferred from the mere fact that the court will look into the writ in the case of a default judgment that the defendant has therefore waived no right to object and that the writ will be quashed on motion for defects which do not make it void? Moreover, there is a distinction between a substantially defective declaration and substantially defective, but not void, process. The process has performed its function when it has given the defendant sufficient notice, but the declaration is the basis of the plaintiff's right to recover.

In conclusion, it is submitted that the curative effect of section 15 of chapter 125 of the Code was not intended to be modified by the provisions of chapter 134, so as to permit a motion to quash a writ for any defect that could not have been made the subject of a motion to quash before judgment; and that a motion to quash can be entertained either before or after judgment only on the assumption that the writ is void. When the defect does not make the writ void a motion to quash should be rejected on the theory (1) that merely voidable process is sufficient to sustain a judgment and (2) that the defendant has had sufficient notice to compel him to plead in abatement. This would seem to be the only consistent interpretation of the statute when the defendant has appeared before judgment; and how or why should either one of the two considerations mentioned be changed by the mere fact that the defendant has stayed out of court, subjected the plaintiff to further delay in the event of a motion to quash, and permitted a default judgment to go against him? Would there not be even more reason for refusing a motion to quash after judgment, when

ment is by default in Nettcr-Oppenheimer & Co. v. Elfant, note 12 supra; Town of Point Pleasant v. Greenee, note 30 supra. However, it is said that the writ will be looked into in the case of a default judgment for the purpose of sustaining the judgment and not for the purpose of defeating it. See Lambert v. Ensign Manufacturing Co., note 10 supra.

In Lynch v. West, 63 W. Va. 571, 60 S. E. 806 (1908), although the language of the court in connection with the context is not entirely clear, it is said: "Where there has been no appearance and judgment by default the statute relating to pleas in abatement will not deny to a defendant his right by motion, under sections 1 and 5, chapter 134, to correct or reverse the judgment for error of fact in the execution of process, or errors apparent in the execution thereof. In such a case the statute relating to pleas in abatement has no application." If, as would appear probable, this language relates to the service, and not to the essentials, of the writ, it would seem to be correct; for if the return is insufficient, it will not appear that the defendant has been served. Likewise, since the return of service appeared to be bad, it is believed that the court properly permitted the defendant, on motion, to go back of the return and attack the sufficiency of the writ itself.
the defendant has the same notice as before and when the accumulated consequences of his delinquency will impose all the greater hardship upon the plaintiff?

A discussion of *Laidley's Admr. v. Bright's Admr.* should not be dismissed, however, without the suggestion that the decision may be consistently sustained on principles other than those urged by the court. Some courts have held that process not signed by the clerk is void. Our own court has so held in effect in deciding that a summons issued by a justice of the peace and not signed by the justice does not bring an action into being.\(^34\) Although such a holding has been criticised as technical, it is not without reason. The law does not contemplate that a party can issue his own process and the signature of the clerk is the only authentic indication on the face of the writ that it has been issued under his authority.

**AMENDMENT OF PROCESS.**

It is believed that the rule as to the amendability of process is correctly stated in the syllabus of the West Virginia case of *Fisher v. Crowley*.\(^35\)

"A summons commencing an action in a court of record cannot be amended in any substantial particular unless the statutes of amendment authorize it."

At common law, mere formal defects may be cured by amendment, because the process after amendment is substantially the same as before; but substantial defects cannot be cured by amendment, because, it is said, to do so would be to falsify the officer's return of service. Process substantially amended is not the same process as before amendment; wherefore it can not be said that the amended process was served upon the defendant, and the return saying that it was so served is false. The common-law rule, however, has been radically changed by statute in West Virginia.

It has already been noted that, by virtue of statute, process may be amended so as to cure a misnomer. As to other defects, and variances between the writ and the declaration, it is well to note again the precise words of the statute:\(^36\)

"In other cases, the defendant on whom the process summon-
ing him to answer, appears to have been served, shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the plaintiff to amend the writ or declaration so as to correct the variance, and permit the return to be amended, upon such terms as to it shall seem just."

Taking the common-law rule, to the effect that a writ can not be amended in any substantial particular, as the starting point, it is pertinent to inquire to what extent, if any, the statute just quoted has modified the common-law rule. First of all it should be noted that the phrase, “the court may permit the plaintiff to amend,” would seem to indicate that the statute intends to let the discretion of the court control in all instances, where an amendment is permitted at all, as to whether there shall be an amendment. But doubtless such a discretion must be soundly exercised and is reviewable. Also, the court may permit the amendment "upon such terms as to it shall seem just." Since it would rarely, if ever, seem necessary to impose "terms" where merely formal amendments are made, it may be surmised that the phrase last quoted contemplated that substantial amendments may be made. The word "terms" may be taken as referring to costs and continuances, the propriety of the latter depending upon whether the defendant has been surprised by the amendment. It is possible to look upon the phrase, "in every such case," as being ambiguous. It may be taken as referring both to defects within the writ and to variances between the writ and the declaration, or it may be taken as referring only to variances between the writ and the declaration. The additional phrase, "so as to correct the variance," may be taken to mean that it has only the latter application, and this has been the view of the court expressed in at least one case.:

"Sections 14 and 15 of chapter 125 of the Code provide for the correction of mismomers and variances in the writ and nothing more. Hence, it is probable that they are merely declaratory of the common law and do not authorize an amendment in such a case as this."

Again, the phrase, "in every such case," may be taken as referring to every case in which there is either a defect within the writ or a

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Italics ours.

23 It would seem that W. Va. Code, c. 125, § 12, as to amending declarations, would offer a fair analogy as to terms of amendment.

variance—in other words, to the existence of a defect or a variance—or it may be taken as referring only to every case in which such defect or variance is pleaded in abatement. The latter view has been unequivocally adopted by the court in *Laidley's Admr. v. Bright's Admr.*:40

"But it should be observed that the court is only permitted to allow such amendments of the writ, when the defendant has been served with process, has appeared and pleaded in abatement. As after such plea had been disposed of, a new process could be issued and served corresponding with the proposed amended process, the only effect of this is to save all this trouble, and the defendant being actually in court and therefore knowing of the amendment, the statute wisely declares, that he need not be formally served with process, but he shall be treated as though served with the amended process; and even then, that this amendment under these circumstances may not operate as a surprise or injustice to the defendant, the section we have referred to says, it shall be done only on such terms as the court deems just. Thus careful has our statute law been in the few cases in which it permits a summons to be amended."

Yet, as has already been noted, this does not necessarily mean that, if the defendant should not appear at the proper time and plead in abatement to merely voidable process, so as to give the plaintiff at least an opportunity to ask leave to amend and, if necessary, to sue out a new writ, such process will be held insufficient to support a judgment and hence open to a motion to quash. It may be said that, if the defendant does not plead in abatement so as to show his dissatisfaction with such process and so as to compel an amendment or an abatement, he may be taken as conceding its sufficiency without amendment.

To summarize, it may be said that the statute has been construed, at least by way of dictum, to mean that the court has no power to grant amendments of process in any case except (1) in the case of merely formal defects and (2) where the defendant has appeared and pleaded in abatement to a variance between the writ and the declaration. Thus, if the views of the court have been properly interpreted, it would seem that the statute has been construed so as to give it the minimum of effect as to the possibility of amendment. Of course, if the process is void, in the sense hereinafter indicated, it can not be amended.41 In such a case, there is nothing to amend. An adequate amendment would be equivalent

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40 Note 28, supra.
41 See cases cited in notes 22, 23 and 24 supra.

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to a new writ. Furthermore, since the statute is construed as changing the common-law rule as to amendments only in cases of variance between the writ and the declaration, substantial defects within the writ which make the process merely voidable can not be amended. Hence, as to defects within the writ itself, the common-law rule still prevails to the effect that only formal defects can be cured by amendment. However, in accord with the construction placed upon the statute as explained, it has been held that amendments may be made in substantial respects for the purpose of curing a variance between the writ and the declaration, even to the extent of changing the form of action stated in the writ.\(^{42}\) On the other hand, even in the case of a variance, it has been held, at least by way of dictum, that the court has no discretion so to amend the writ so as to introduce new parties plaintiff.\(^{43}\)

If there can be substantial defects in the writ of such a negligible nature that the statute requires them to be pleaded in abatement or else waived, the possibility of which the writer has attempted to demonstrate, it would seem in accord with justice at least to leave a discretion in the court to permit such defects to be cured by amendment when pleaded in abatement. As already indicated, this can not be done. Whether the court is wrong in construing the various and confused terms of the statute so as to deny permission to amend in such cases would be difficult to demonstrate. If the court is wrong, its error would seem to come from following too closely the literal words of the statute. If all students of the law have had as much difficulty as the writer in seeking to understand and reconcile the various terms of the statute involved in this discussion, it would seem that the statute is sadly in need of revision.\(^{44}\)

\(^{42}\) Barnes v. City of Grafton, 61 W. Va. 408, 56 S. E. 608 (1907); Ryan v. Piney Coal & C. Co., 72 W. Va. 636, 78 S. E. 789 (1913); Shaffer v. Security Trust Co. 82 W. Va. 618, 97 S. E. 250 (1918).

\(^{43}\) Phillips v. Deveny, 47 W. Va. 653, 35 S. E. 821 (1900).

\(^{44}\) It is believed that the changes made in the corresponding Virginia statute by the Code of 1919 are inadequate. About the only substantial change made by the amendment is to insert the word "valid" before the word "process" in the section corresponding to our section 15 of chapter 125. It is submitted that the chief effect of this amendment is to insert one more word that will need construction into a statute that has already offered too many opportunities for construction. It occurs to the writer that the following, although it no doubt can be improved upon, would more definitely meet the evils which the statute was intended to obviate:

In other cases, the defendant on whom the process summoning him to answer appears to have been served shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless such defect or such variance be pleaded in abatement. And in the case of every such defect or such variance, whether the same shall be pleaded in abatement or not, the court may at any time permit the plaintiff to amend the writ or the declaration so as to correct the defect or the variance, and permit the return to be amended, upon such terms as to it shall seem just. But nothing herein shall deprive the
defendant of any right which he has by the common law to make a motion to quash process which is void.

It is realized that the use of the word "void" in the text of the proposed statute leaves open a large field for construction, but there would seem to be no adequate alternative. If it should be deemed inadvisable to leave this word entirely open for construction, the statute might be extended by expressly enumerating certain classes of defects which shall not make the process void. A precedent for this will be recognized in the provisions of chapter 125 of the Code dealing with formal defects in pleadings.