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PRACTICAL TREATISE

ON

NULLITIES & IRREGULARITIES

In Law,

THEIR

CHARACTER, DISTINCTIONS, AND CONSEQUENCES.

BY H. MACNAMARA, ESQ.

OF LINCOLN'S INN, SPECIAL PLEADER.

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TO

W. A. DOW, ESQ.

OF

King's Bench Walk,

TEMPLE.

These pages are inscribed as a testimony of respect for his talents, and an acknowledgment of the obligations which his friendship and professional instructions have conferred on his pupil and friend,

H. MACNAMARA.

INTRODUCTION.

THE compiler of this work ventures to hope that it may be acceptable to the legal profession, as an attempt to elucidate a branch of practice which is in constant request, and which, though noticed in every practical book, presents materials so numerous and so important, as to be deserving of a separate treatise. From the difficulty that often occurs in distinguishing a nullity from an irregularity, from the fatal consequences of an error, and from the promptitude of action required in taking advantage of an irregularity, the subject is peculiarly fitted to form the groundwork of a manual, that, containing the rules and authorities systematically arranged, may afford speedy information and facilities of reference.

This work is divided into two parts. The First Part contains such general principles as may be gathered from the decided cases; and in the Second Part will be found, alphabetically arranged, instances of null and irregular proceedings in every stage of an action, and also in some collateral matters, as capias, arrest, &c., together with the mode and time of

taking advantage of them, or of waiving that advantage, and cases in which the Courts will permit an amendment. It has not been attempted to give every instance of an irregularity, as this would have been little short of writing a book of practice; but copious authorities have been selected, and the rule chiefly adopted in their selection has been the intrinsic value of the decision, as being of importance in itself, or the value it derives either from, illustrating some general doctrine, or from being of recent date. It is hoped they will be found sufficiently numerous to afford examples and guides on other occasions.

The books of practice, written by Messrs. Tidd, Archbold, Chitty, Lush, and Bagley, have contributed much from their valuable stores to this humble compilation. It only remains to observe, that when Dowling's Reports, &c. are cited, without N. S. (New Series) being added, they belong to the Old Series.

5, *Inner Temple Lane.*

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PART I.

GENERAL RULES.

THE necessity of following prescribed forms, and of acting in accordance with recognized rules of practice, for the sake of preserving uniformity and certainty, is no where more apparent than in the Law. A science so extensive in its application, and entering so generally into the common affairs of life, requires every aid of this nature to prevent unnecessary confusion and delay. Hence an adherence to such forms and rules is strictly exacted by the Courts, and a deviation from them in most cases is attended with disadvantage to the party in fault. A departure from the established course, whether in the process itself or in the mode of conducting the process, sometimes renders the proceeding substantially bad and incurable; sometimes it is regarded as a merely formal defect, and then

it is a ground for setting aside the proceeding, or amending it at the costs of the party offending, or in some few instances it may be considered as too immaterial for an objection (*a*).

Definitions. Irregularity.

An irregularity, in its most general sense, is the technical term for every defect in practical proceeding or the mode of conducting an action or defence, as distinguishable from faults in pleadings, which can only be objected to by demurrer or motion in arrest of judgment or by writ of error (*b*). It is the want of adherence to some prescribed rule or mode of proceeding; and in its more limited and common sense, and the one in which we shall henceforth use it, it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner (*c*). A defect is here supposed, but one that does not take away the foundation or authority for the proceeding, or apply to its whole operation (*d*). This distinguishes an irregularity from a nullity (*e*), which

Nullity.

(*a*) A departure from a prescribed form, especially if prescribed by statute, is scarcely ever regarded as immaterial, and the Courts are averse to entering into the distinction between material and immaterial objections.—See 1 Dowl. 519.

(*b*) 3 Chit. Gen. Pr. 509.

(*c*) Tidd, 512, (9th ed.).

(*d*) *Per* Coleridge, J., 9 Dowl. 595.

(*e*) " Where the proceeding adopted, is that prescribed by

is the highest degree of an irregularity in the most extensive sense of that term, and is such a defect as renders the proceeding, in which it occurs, totally null and void, of no avail or effect whatever, and incapable of being made so.

It is very difficult to give a concise, and yet sufficiently comprehensive, definition of a nullity. Its character will be best understood by the decided instances of it and by a reference to the incidents which pertain to it. Perhaps, however, it may be defined as a proceeding that is taken without any foundation for it, or that is essentially defective, or that is expressly declared to be a nullity by a statute.

Under the first division comes the signing of judgment before appearance entered. This is wholly unwarranted; there is no person before the Court against whom judgment can be signed, and thus the whole foundation of the proceeding is taken away. The second branch rests chiefly on rules, which the Courts have adopted, resolving to hold certain proceedings as of no effect, and thus to promote the due administration of the law, and to frustrate

the practice of the Court, and the error is merely in the *manner* of taking it, such an error is an irregularity; but where the proceeding itself is altogether unwarranted and different from that which, if any, ought to have been taken, then the proceeding is a nullity."—2 Chit. Archb. 1044; and see the four general rules laid down as to irregularities, Id. 1042.

intentions of delay and injustice. Hence counsel's signature is required to particular pleas, in order to prevent sham, absurd, or frivolous allegations from being placed upon the record; and if the signature be omitted, or if the pleas on their face be manifestly sham and intended for delay, they are nullities. In illustration of the third branch, if process be served on a Sunday, or be directed against the person or goods of an ambassador, it is declared by statute null and void. It has also been decided, that if a proceeding be expressly directed to be taken by a statute, its omission amounts to a nullity (*f*).

Distinctions between nullities and irregularities in their signification.

Thus it will be seen that an irregularity is a formal, but a nullity is always a substantial, defect, being analogous to the causes of special and general demurrer, when demurrable faults occur in pleadings; the one applies chiefly to the manner, the other to the matter or merits, of the proceeding; the former is voidable, the latter absolutely void.—Signing judgment against one not before the court is an act wholly without warrant or foundation; but if on a verdict for £20 I enter up judgment for £40, here I have taken a step which I was entitled to take, entering a judgment being warranted by the verdict; but

(*f*) See *Mortimer* v. *Pigott*, 2 Dowl. 616; and *Garratt* v. *Hooper*, 1 Dowl. 28. See "*Scire facias*," in the Second Part.

having taken it in an improper manner, it is an irregularity.—Again, though the sheriff must state some amount in his return to a *fi. fa.*, as the value of the goods seized, yet where he omitted to do so, Coleridge, J., held it to be merely irregular, saying, "*The return contains all essentials*, but it does not give the plaintiff that full information as to one point, which it ought; . . . . but it cannot be said to be *no return*"(*g*). So where a step is perfectly well taken, according to the supposition on which it is founded, but which supposition is not correct, it is only an irregular proceeding; as where plaintiff, erroneously supposing that defendant had not entered an appearance, entered one for him, and then, acting on the hypothesis, served notice of filed declaration on defendant himself in the country, though defendant had appeared by attorney; such service was holden not a nullity, but an irregularity (*h*); and *per* Williams, J.—"I cannot assent to that view of the subject (that it was null), *because* every thing was done perfectly well on one supposition, that the appearance had not already been entered by the defendant. It was a step wholly appropriate to proceedings in a cause, where the facts would have allowed it. It seems to me, therefore,

(*g*) *Chambers* v. *Coleman*, 9 Dowl. 595.
(*h*) *Alsager* v. *Crisp*, 9 Dowl. 353.

quite impossible to consider this as other than an irregularity." An infringement of merely technical rules seldom, if ever, amounts to more than an irregularity.

It may be laid down as a certain rule, that whenever there is *any* doubt upon the matter, it will always be safer to treat the defect as an irregularity, rather than as a nullity. From the decisions and the rules of the courts, it may be gathered that there is an evident tendency in the learned Judges to consider defects merely as irregularities (*i*).

Distinctions between nullities and irregularities in their incidents.

The distinctions between nullities and irregularities in their incidents, are more clearly marked than in their general definitions, and are of very great importance.

Waiver.

I. An irregularity may be waived; a nullity never can be waived (*k*); that is, the objection to the former, but not to the latter, may be waived. In *Holmes* v. *Russell*, it was said, by Coleridge, J.—"It is difficult sometimes to dis-

(*i*) See Reg. M. T. 3 Will. 4, s. 10.

(*k*) *Holmes* v. *Russell*, 9 Dowl. 487; *Chambers* v. *Coleman*, Id. 588; *Garratt* v. *Hooper*, 1 Dowl. 28; *Roberts* v. *Spurr*, 3 Id. 551; *Hanson* v. *Shackleton*, 4 Id. 48; *Smith* v. *Sandys*, 5 N. & M. 59. The principle of waiver, as applied to irregular and null proceedings is acted upon also in the Courts of Chancery; see *Levi* v. *Ward*, 1 Sim. & St. 334; 2 Daniel's Chanc. Prac. 304; and Chitty's Eq. Index, tit. "Waiver."

tinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity, is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." In that case, it was sworn that defendant, who was the accommodation acceptor of a bill of exchange, had never been served with process; and it appeared that plaintiff, on a wrongful affidavit of service, had entered an appearance for defendant, and signed judgment for want of a plea. It was holden, that the proceedings were not void, for "suppose the defendant," continues the learned Judge, "had full notice that an appearance had been entered for him, and he had taken the declaration out of the office and pleaded, it could not be objected by him that there was a defective service. The objection might therefore be waived, and consequently it is a mere irregularity." Mesne process is only to bring a party before the Court; and if by his own act he shows that he is before the Court, such as by recognizing the appearance entered for him, the omission of its service is remedied; but as judgment signed without any appearance is a nullity, it cannot be waived, whether by accepting and keeping the declaration (*l*) or otherwise. So in

(*l*) As in *Roberts* v. *Spurr*, 3 Dowl. 551.

Garratt v. *Hooper*, where a plea in abatement was a nullity, and plaintiff, after the plea had been delivered, amended his declaration and paid the costs of a judgment of *nonpros* signed against him, it was holden no waiver; and by Taunton, J.—"There is this difference between an irregularity and a nullity; an irregularity may be waived, but a nullity cannot." Here then is one guide to the discovery of what constitutes a nullity in law. Can the objection be waived? Has it been decided that it can, though not on the distinction between null and irregular proceedings, or does it follow from legal principles that certain acts should render the defect good or unobjectionable? If so, it is but an irregularity.

Qualification of general rule.

The doctrine that a nullity can never be waived is certainly true in the strict sense of *waiver*, but the practitioner must be careful not to carry it so far as to suppose that at *any* period, or under *any* circumstances, this objection must of necessity be available. Thus a plea, null in itself, as a plea in abatement pleaded without an affidavit of verification, or a special plea without counsel's signature, would probably be cured of their defect by plaintiff's replying to them. "Nor is it to be supposed," observes Mr. Chitty (*m*), "that if a defendant plead in bar, and there has been

1. Pleading over.

(*m*) 3 Gen. Prac. 552, (*d*), 525.

a regular trial and verdict, that the latter or that judgment and execution thereon would afterwards be set aside, on the ground that no formal appearance was entered for defendant(*n*)."

A party also may be prevented from taking advantage of a nullity, on account of some previous irregularity in his own proceedings; thus, if plaintiff improperly omit to demand a plea, and defendant plead a nullity, judgment may not be signed on the plea, because it is as if *no plea* had been pleaded, and in that case a demand of plea must have been made before judgment could be signed (*o*). 2. Previous irregularity of party himself.

So the party who would be entitled to object may be estopped by his own agreement from 3. Agreement.

(*n*) In like manner, even such a defect in pleading as would be ground for a general demurrer, may be cured by pleading over, where the next pleading *expressly* supplies the omission, or remedies the defect. In an action of trespass for taking a hook, where the plaintiff omitted to state that it was his hook, or that it was in his possession, (thus not stating any title to sue,) and defendant in his plea justified the taking the hook *out of the plaintiff's hand*, the Court held, on motion in arrest of judgment, that the declaration was cured by the plea. *Glasscock* v. *Morgan*, Sid. 184; Bac. Ab. Trespass, (I.); and see "Aider," in the Index to Chitty, and Stephen on Pleading. In one case (*Mills* v. *Brown*, 9 Dowl. 151,) Mr. Justice Coleridge refused summarily to interfere, by giving leave to sign judgment, even on a *null* plea where there had been delay, and the plaintiff might have signed judgment himself.

(*o*) *Hough* v. *Bond*, 1 M. & W. 314. So where no rule to plead given. *Warne* v. *Beresford*, 4 Dowl. 361.

taking advantage of a nullity, and thus render it *in effect* the same as if it had been a regular proceeding, according to the maxim, *Quilibet potest renunciare juri pro se introducto.* Therefore a writ of summons having been served on the defendant, when more than four months had expired from its date (*p*), and this at his own request, in order to avoid the expense of an *alias* writ, and an appearance also having been entered upon it at his request, it was decided that he could not object to the service (*q*); and by Tindal, C. J.—"This is not a case of simple waiver. I agree that a nullity cannot be waived; but here there is a great deal more. Here the very irregularity relied on is an act done at the defendant's own request."—"This is not properly a waiver," said Maule, J.; "it is an agreement to accept service after the proper time for service has expired." Here there was an *express* agreement to waive any objection to the service of the process; but an *implied assent* to its validity by taking any step in acquiescence of it, as putting in bail to process served on a Sunday, would not be sufficient (*r*).

(*p*) Such service of itself would, it seems, be no service in law, and certainly the above case was decided on this assumption. The stat. 2 Will. 4, c. 39, s. 10, declares that no writ issued by authority of that Act "shall be in force" for more than four calendar months from the day of its date.

(*q*) *Coates* v. *Sandy*, 2 M. & G. 313.

(*r*) See *Taylor* v. *Phillips*, 3 East, 155.

And though a nullity cannot itself be rendered good, yet it seems, that where the *omission of a step altogether is a mere irregularity*, if it be taken in such a manner as to be null, it is as no step, and the same as if it had been altogether omitted, and consequently renders the next step irregular merely, and liable to waiver. Thus, as proceeding to judgment and execution without service of process has been holden to be an irregularity merely (*s*), and as service on a Sunday is no service, the proceedings had thereon should likewise be only irregular. It has been decided that the entering a rule to plead before delivery or notice of declaration is a nullity; but defendant cannot object to this after having obtained an order for time to plead, because, after that step, he could not have objected if no rule whatever had been entered, the *omission* being only irregular (*t*). 4. Where omission of step an irregularity.

The Rule of Court (H. T. 2 Will. IV. R. 33), declares that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time; nor if the party applying has taken a fresh step after knowledge of the irregularity" (*u*). The Waiver generally.

(*s*) *Holmes* v. *Russell*, 9 Dowl. 487.

(*t*) *Pope* v. *Mann*, 2 M. & W. 881; nom. *Bolton* v. *Manning*, 5 Dowl. 769, S. C.

(*u*) The object of this rule is to prevent expense, and it is in accordance with the maxim, "*Vigilantibus et non dormien-*

Knowledge of irregularity.

knowledge of the irregularity is the starting point both for the computation of the time and for the taking of the next step; but the test of the knowledge is not when the party first actually knew, but when he first had *the means of knowing* of the irregularity.

"He is bound to come promptly," says Pattison, J. (*x*), "after he knows of the proceedings in which the supposed irregularity exists, and not after he knows of the irregularity itself." It was therefore holden too late, after delay from the year 1833 to 1838, to object that defendant's residence was not indorsed on the *ca. sa.* whereby he was taken in execution, though he distinctly swore that the defect was not discovered until shortly before the application; and so where the delay in objecting to an irregular outlawry was from the 4th of June to Michaelmas term, though the proceeding itself was not brought to the party's notice until within six weeks of the application (*y*).

There would be a distinction between such a case as the indorsement on the *ca. sa.*, where the irregularity appears on the proceeding itself, which is brought before the eyes of the appli-

tibus jura subveniunt." It does not apply to amendments. *Welch* v. *Hall*, 1 Dowl. 365, N. S.

(*x*) *Esdaile* v. *Davis*, 6 Dowl. 468; and see *Blackburn* v. *Peat*, 2 Dowl. 293; *Tarber* v. *French*, 5 N. & M. 658.

(*y*) *Lewis* v. *Davison*, 3 Dowl. 272.

cant, and a step taken behind his back, as signing judgment, when the time begins to run only from the notice that interlocutory judgment is signed (*z*). In consequence of the above interpretation of the rule, defendant will have no greater latitude on account of the declaration being filed, instead of delivered; and therefore, as he might take it out of the office, whether he does or not, he cannot object to it after the usual period (*i. e.* time for pleading) has elapsed, computing from the day when he received notice of its being filed. As an illustration of a fresh step after the means of knowledge, if he take the declaration out of the office, he waives any objection to a variance between it and the notice or writ, because, without taking it out, he could have gained sufficient information from the clerk of the declarations (*a*). The *onus* of showing that he had not the means of knowing of the irregularity lies on the party applying (*b*).

It makes no difference, though the proceeding by which he has notice be irregular in itself. Thus, service of notice of declaration on defendant in the country, instead of on his

(*z*) *Per* Littledale, J., *Grant* v. *Flower*, 5 Dowl. 419; and see *Roberts* v. *Cuttill*, 4 Dowl. 204; and cases, *ante*, p. 12, n. (*x*).

(*a*) *Robins* v. *Richards*, 1 Dowl. 378; see "Declaration," in the Second Part.

(*b*) *Anderdon* v. *Alexander*, 2 Dowl. 267.

London agent, where he had appeared by attorney, is sufficient to bring home to him a knowledge of an appearance having been irregularly entered for him by plaintiff (*c*). But it is otherwise if the proceeding giving information be void in itself, for then it is as no notice (*d*).

Reasonable time.

The "reasonable time" (*e*) mentioned in the rule, of course, varies according to circumstances, and it is so completely in the discretion of the Judge, (if application be made at chambers,) that the Court will not review his decision on this point (*f*). As a general rule, however, it does not extend beyond the time limited by law for taking the next step after means of knowing of the irregularity; and this, whether the next step is to be taken by the party applying, or by the party guilty of the irregularity (*g*).

(*c*) *Alsager* v. *Crisp*, 9 Dowl. 353; *Roberts* v. *Cuttill*, 4 Dowl. 204.

(*d*) *Id.*

(*e*) See on reasonable time generally, Com. Dig. "Temps," D. E. F.; and 2 Man. & Graing. 399, (b).

(*f*) *Tadman* v. *Wood*, 4 A. & E. 1011.

(*g*) See *Rutty* v. *Arbur*, 2 Dowl. 36; *Routledge* v. *Giles*, 2 C. & J. 163; *Downes* v. *Witherington*, 2 Taunt. 243; *Dand* v. *Barnes*, 6 Id. 5; *Gaire* v. *Goodman*, 2 Smith. 391; *Fletcher* v. *Wells*, Id. 191; and see cases in the Second Part. But it is no waiver *by fresh step*, if it be taken by party who has been irregular. *Post*, "Fresh step." An intermediate Sunday counts; and where notice of declaration was served late on Saturday, it was held, defendant should apply in respect of it on the Wednesday ensuing. *Willis* v. *Ball*, 1 Dowl.

Thus an irregularity in the writ of summons must be objected to within the eight days limited for appearance; in the writ of *capias*, within the same period allowed for putting in bail; in appearance entered by plaintiff for defendant, the application must be before judgment by default; in declaration or notice of declaration, before the time given for pleading. So where the next step is to be taken by the opposite party, as if irregularity be in judgment by default, application must be before the rule to compute is disposed of, or the writ of inquiry executed. But where the writ served was against defendant by a wrong surname, it was held that he need not notice such process, but might wait until plaintiff took the next step, to see whether he would do anything on such process (*h*).

Excuses for not applying within reasonable time.

As the reasonable time lies within the discretion of the Judge or Court, except as it may be restrained by decided cases, an excuse for not applying within an earlier period may often prevail, as;—

1. It is sufficient that defendant applied promptly to a Judge at chambers, who refused the application, provided the same objections

303, N. S.; and see 4 Dowl. 283. And if the last day for applying fall on a Sunday, the party should apply, it seems, on the Saturday; see 3 Dowl. 439.

(*h*) *Hinton* v. *Stevens*, 4 Dowl. 283.

were then stated, and the rule *nisi* be drawn up on reading the summons and order of the Judge, or on reading an affidavit of the fact (*i*), and provided he apply to the Court as speedily as possible after the decision of the Judge (*k*).

2. So where it is a subsequent proceeding, that proves the irregularity of a former one, as were the action is in debt or *assumpsit*, and the amount is not indorsed, and it does not appear until declaration that it is a claim within the rule (*l*).

The following are not sufficient excuses for delay:—

1. Change of attorney (*m*).
2. The attorney being out of town, though affidavit was sworn in time (*n*).
3. The illness of a witness, whose affidavit was necessary to support the application, because a commissioner might have been sent to him to take his affidavit (*o*).

(*i*) *Shugars* v. *Concanen*, 7 Dowl. 391; *post*, p. 21. Production of the summons and order or affidavit is necessary; and this, though the same Judge, being in court, certify the fact of the former application to him. *Goren* v. *Tute*, 7 M. & W. 142.

(*k*) *Shield* v. *Quick*, 8 M. & W. 289.

(*l*) See Lush's Prac. p. 328; and see *post*, p. 22. Most of the rules that prevent a fresh step from being a waiver, will probably apply to waiver by delay, and *vice versâ*.

(*m*) *Golding* v. *Scarborough*, 2 Har. & Wol. 94.

(*n*) *Willis* v. *Ball*, 1 Dowl. 303, N. S.

(*o*) *Orton* v. *France*, 4 Dowl. 598.

4. The illness of the party himself, as he need not apply in person (*p*).
5. The party conducting his case in person (*q*), and by Coleridge, J.—"If parties choose to conduct their own cases, they must submit to the same rules as other persons. The Court cannot make any distinction."
6. That the party applying is a prisoner (*r*).
7. That the matter affects the liberty of the subject (*s*).

The cause for excuse must be clearly established by the applicant (*t*), and should appear on the face of the rule *nisi* or summons, where *primâ facie* the application is too late (*u*).

Secondly, a fresh step in the cause taken by the party applying after means of knowledge, is a waiver of the objection at all events, however short may be the period which has elapsed (*x*). Fresh step.

(*p*) *Daly* v. *Mahon*, 4 Bing. N. C. 8.

(*q*) *Currey* v. *Bowker*, 9 Dowl. 523.

(*r*) *Primrose* v. *Baddeley*, 2 Dowl. 350; *Fife* v. *Bruere*, 4 Id. 329.

(*s*) *Tarber* v. *French*, 4 A. & E. 362; and cases there cited. It is no excuse, that the party has been misled by a book of practice or other unauthorized publication. *Crew* v. *Atwood*, 7 Taunt. 70; and see *Lear* v. *Heath*, 5 Id. 201.

(*t*) *Anderdon* v. *Alexander*, 2 Dowl. 267; *Herbert* v. *Darley*, 4 Id. 726; *Esdaile* v. *Davis*, 6 Id. 465.

(*u*) See *Shugars* v. *Concanen*, 7 Dowl. 391.

(*x*) Change of attorney is no step in the cause. *Deacon* v.

Hence, appearance by defendant precludes him from taking advantage of an irregularity in the process. So taking the declaration out of the office waives an objection on the ground of variance between the writ and notice of declaration, or between either of them and the declaration itself (*y*).

Acquiescence in validity.

So if the party objecting has done any act expressive of acquiescence or assent in the validity of the proceeding, he is in general estopped from taking advantage of an irregularity in it. The act, it seems, must show an *intention* in this case to waive the objection; and thus irregularity in process has been holden unobjectionable where defendant's attorney undertook to appear, receive declaration, and give security (*z*); so where he admitted the debt and requested time to pay it (*a*), or where he paid the debt and part of the costs (*b*), or obtained time to put in bail (*c*).

And to accept the costs of an amendment is

Fuller, 1 Dowl. 675. A fresh step comes more properly than delay under the strict definition of waiver. In *Stevenson* v. *Danvers*, 2 B. & P. 110, waiver is said to be the doing something after an irregularity committed, where the irregularity might have been corrected before such act done.

(*y*) *Heywood* v. *Fayrer*, 1 Dowl. 256, N. S. The cases on this point will be found collected under their respective titles in the Second Part.

(*z*) *Anon.*, 1 Chit. R. 129.

(*a*) *Rawes* v. *Knight*, 1 Bing. 132.

(*b*) *Monday* v. *Sear*, 11 Price, 122.

(*c*) *Moore* v. *Stockwell*, 6 B. & C. 76.

a waiver of the defects amended, though they amount to error on the record (*d*); and it has been decided that defendant's attorney, having accepted declaration and said, "It is all right, I will call and settle the debt and costs" (*e*), was prevented from objecting to the declaration. But in one case an application for time to settle the action was held no waiver of irregularity in the declaration (*f*); and by Parke, J.—"There was something to ask time for. It is a question whether such an application for time was a waiver of the irregularity. Asking for time is an admission that the plaintiff is in a situation to go on; but I do not know that it is an admission that the step was regular."

Exceptions.

But an objection to an irregularity is not waived;—

1. If the fresh step be taken by the party himself who has been guilty of the deviation from rule. It will be observed that the words of Reg. 33, H. 2 Will. IV. are, "if *the party applying* has taken a fresh step;" and accordingly it has been decided, that if plaintiff enter an appearance for defendant, the latter may still

(*d*) *Graves* v. *Walter*, 1 Scott, 312.

(*e*) *Lloyd* v. *Hawkyard*, 1 Man. & Ryl. 320.

(*f*) *Anon.*, 1 Dowl. 23; and to put in bail was holden no waiver of an irregularity in declaration even before 1 & 2 Vict. c. 110; see 2 Chit. Arch. p. 1047. See *post*, "Declaration."

object to the writ of summons or the service thereof (*g*), provided he apply within a reasonable time.

2. Neither does the waiver operate as against third parties, but it binds only those who have taken the step. Hence the fact of the principal having waived an irregular arrest does not prevent bail from objecting to it, so as to have the bail bond cancelled (*h*). Again, if plaintiff in his previous proceeding against bail be irregular, the sheriff is not liable to an attachment on such bail afterwards not being perfected; and this, though defendant has waived the irregularity as against himself (*i*).

3. Waiver does not occur where the next step is taken of necessity in order to prevent judgment being signed; therefore, when pending a rule to set aside a *scire facias*, which rule (having been obtained on the last day of term) did not operate as a stay of proceedings, the defendant appeared to the *scire facias* in order to prevent judgment, it was holden no waiver (*k*);

(*g*) See *Chalkley* v. *Carter*, 4 Dowl. 480; *Davis* v. *Skerlock*, 7 Dowl. 532; *Ledwick* v. *Prangnell*, 1 Moore, 299.

(*h*) *Hammond* v. *Taylor*, 3 B. & Ald. 408.

(*i*) *Rogers* v. *Mapleback*, 1 H. Bla. 106; and see *Hodson* v. *Garrett*, 1 Chit. R. 174, n.; *Cohn* v. *Davis*, 1 H. Bla. 80.

(*k*) *Coxeter* v. *Burke*, 5 East, 462; and see *Rex* v. *Pearson*, 3 Price, 288. Where defendant pleaded to it pending a rule to set aside the writ, it was decided he could not object; *Sloman* v. *Gregory*, 1 D. & R. 181; in which case, however,

and it is no waiver of the right to *oyer*, if defendant after demand and refusal of *oyer* plead so as to save a judgment (*l*).

4. Where an application to set aside the proceeding has been made at chambers and overruled, the taking of the next step is no waiver, provided that the party stated to the Judge all the grounds on which he means to rely, for he is considered to have waived all objections which were not then advanced (*m*); and provided also, it would seem, that the rule *nisi* appear on the face of it to be drawn up on reading the order of the Judge, or an affidavit of the fact, as in the case when the application to the Court is *primâ facie* unreasonable (*n*), and also that the Court be applied to as speedily as possible after the decision of the Judge (*o*).

the rule appears to have operated as a stay of proceedings, and therefore the plea was not necessary to prevent judgment.

(*l*) *Goodricke* v. *Turley*, 4 Dowl. 431; and see *Woodcock* v. *Kilby*, Id. 730.

(*m*) *Thorpe* v. *Beer*, 2 B. & Ald. 373; and see *Tory* v. *Stevens*, 6 Dowl. 275; and *Cock* v. *Brockhurst*, 13 East, 588.

(*n*) *Shugars* v. *Concanen*, 7 Dowl. 391; for the same reasons will apply, *viz.* that the application being *primâ facie* too late, the Court cannot of itself notice what passed at chambers, and that no notice has been given to the other side, who might reasonably presume that the party did not mean to rely on the previous application at chambers. This presumption would easily arise on a fresh step being taken, as the delivery of a plea and the like.

(*o*) *Shield* v. *Quick*, 8 M. & W. 289.

In accordance with the above rule, though pleading under protest of itself will not prevent the waiver (*p*), it is otherwise if a plea be pleaded with, or, as it seems, without a protest, after an unsuccessful application at chambers (*q*); or if after such application an order for particulars be obtained, for these may be necessary to enable defendant to plead at all (*r*).

5. Acquiescence in proceedings, though it may be equivalent to a fresh step, yet is no waiver, where it is caused by a mistake of the Judge in point of law. Therefore, where an irregular judgment had been signed, and the defendant took out a summons before Vaughan, B., to set it aside, who, however, being of opinion that it was regular, terms were offered, and an order drawn up to the effect, that plaintiff should accept £3 for the debt, with taxed costs, but the order was not served on the plaintiff, and a writ of inquiry was executed on the judgment; the Court, on motion, set aside the judgment and subsequent proceedings (*s*); and it was said by Lyndhurst, C. B.—"Under these circumstances the order does not appear to be binding. It was done (*t*)

(*p*) *Tory* v. *Stevens*, 6 Dowl. 275.

(*q*) *Id.*; *Woodcock* v. *Kilby*, 4 Dowl. 730.

(*r*) *Tory* v. *Stevens*, *supra*.

(*s*) *Whalley* v. *Barnet*, 1 Dowl. 607; and see *Woodcock* v. *Kilby*, 4 Id. 730.

(*t*) *Quære* "made."

under a misapprehension, and after Mr. Baron Vaughan's opinion delivered, which was wrong."

6. Though waiver prevails, where the fresh step is in itself irregular, yet it is otherwise where it is void; for then it is as if no step whatever had been taken. Thus where no rule to plead had been entered, and a plea which was a nullity was delivered, judgment signed thereon was set aside (*u*), the null plea not dispensing with the rule to plead; and *per* Parke, B.—"The plaintiff has treated defendant's plea as a nullity, and if there had been no plea at all, the judgment would clearly have been irregular, for want of a rule to plead." So under similar circumstances, judgment was set aside, where no demand of a plea had been made (*x*).

Relation of waiver.

And waiver does not operate back by relation, except so far as to prevent an objection to the past irregularity. Thus, where process has been served on a defendant by a wrong name, the

(*u*) *Warne* v. *Beresford*, 4 Dowl. 361.

(*x*) *Hough* v. *Bond*, 1 M. & W. 314. Neither a null, nor an irregular plea, is a waiver of the remaining time limited for pleading, where it has been delivered before the expiration of that time; but this proceeds on the ground that defendant may yet deliver a good plea. *Macher* v. *Billing*, 1 C. M. & R. 577; 3 Dowl. 246, 249, n. (*a*); S. C. *Pepperell* v. *Burrell*, 2 Dowl. 674; *Dakins* v. *Wagner*, 3 Dowl. 535; see also on this last point, *Bond* v. *Smart*, 1 Ch. R. 735; *Perry* v. *Fisher*, 6 East, 549; *Brandon* v. *Payne*, 1 T. R. 689; *Lockhart* v. *Mackreth*, 5 T. R. 661; *post*, "Plea."

Court will not grant an attachment against him; and where the irregularity was waived by appearance, it was held not sufficient to bring him into contempt for disobeying it, as if it had been valid at first (*y*).

Having now explained the doctrine of waiver, we may proceed to the remaining distinctions.

Irregularity good for some purposes; nullity not so.

II. An irregular proceeding is good for many purposes, even before it is waived by *laches*, and good for all afterwards; a nullity has no effect whatever. Thus, as we have seen, a notice irregular in itself, will yet be deemed sufficient to bring home to a party the knowledge of a previous irregularity; but a nullity is not any notice (*z*); and it will be seen that irregular process, even after it is set aside, affords a justification to the officer who executes it, but not so if it be null (*a*).

Amendment.

III. A void proceeding is so entirely vitiated, as to be incapable of amendment (*b*), but if merely irregular, the Courts will under circumstances allow it to be amended.

(*y*) *Robinson* v. *Nash*, 1 Anst. 76.

(*z*) *Alsager* v. *Crisp*, 9 Dowl. 353; *Roberts* v. *Cuttill*, 4 Id. 204. So we have seen taking an irregular, though not a null step, operates as a waiver.

(*a*) See *post*, p. 25.

(*b*) As where a writ was returnable on a *dies non*; *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288; and see *post*, p. 48, as to amendments.

IV. A very important result of the distinctions between irregularities and nullities is seen in justification under legal process. Justification under process.

1. If the writ be absolutely void, no person whatever can justify under it (*c*). A party, however, who merely originates a suit, by stating his case to an inferior Court, (*e. g.* a Court of Requests,) is not liable, though the Court proceed without jurisdiction (*d*).

2. If the process be irregular in itself, it yet affords a justification as long as it remains in force: when set aside, the party and his attorney are liable for the acts done under it (*e*); but the sheriff may still justify for anything done under it while it remained in force (*f*).

3. If regular in itself, but irregular in respect of its having issued without authority, as if it

(*c*) *Parsons* v. *Lloyd*, 2 W. Bla. 845; *Grant* v. *Bagge*, 3 East, 128; *Carratt* v. *Morley*, 1 A. & E. 18, N. S.; *Mitchell* v. *Foster*, 12 A. & E. 472; *Brook* v. *Jenney*, 1 G. & D. 567; *Bates* v. *Pilling*, 6 B. & C. 38.

(*d*) *Carratt* v. *Morley*, 1 A. & E. 18, N. S.; and see *West* v. *Smallwood*, 3 M. & W. 418; *Cohen* v. *Morgan*, 6 D. & R. 8.

(*e*) *Barker* v. *Braham*, 3 Wils. 368; *Riddell* v. *Pakeman*, 3 Dowl. 714; *Codrington* v. *Lloyd*, 8 A. & E. 449; 1 W. W. & H. 358; *Sellwood* v. *Mount*, 1 Gale & Dav. 358; and see *Painter* v. *Liverpool Gas Company*, 3 A. & E. 433.

(*f*) *Philips* v. *Biron*, 1 Stra. 509; *Turner* v. *Felgate*, 2 Sid. 125; *Ives* v. *Lucas*, 1 C. & P. 7; and see *In re Glatton Land Tax*, 4 M. & W. 574, *per* Parke, B.; *King* v. *Harrison*, 15 East, 615, n.; *Wooley* v. *Clarke*, 5 B. & Ald. 746.

vary from the judgment, or be founded on an invalid judgment, the same result takes place as when the process is irregular in itself (*g*), except that if the defect be in the judgment, that must be set aside. But the officer, if sued, should not join in pleading with the party or the attorney, for the latter must show the judgment as well as the writ, while the officer may justify under the writ alone (*h*); and unless he sever in pleading, he is bound by the defects apparent on the whole of the proceedings, and foregoes the benefit of his warrant (*i*).

4. If the writ be altogether regular, but be executed in an illegal manner, as on the wrong person or goods, or out of the jurisdiction of the sheriff, the remedy is against the sheriff, and any person who assists in the execution (*k*). If, however, the wrongful act be committed wilfully, and not in the regular course of the

(*g*) *Barker* v. *Braham*, 3 Wils. 368; *Bates* v. *Pilling*, 6 B. & C. 38; and see *Andrews* v. *Marris*, 1 A. & E. 3, N. S.; *Ives* v. *Lucas*, 1 C. & P. 7; *Loton* v. *Devereaux*, 3 B. & Ad. 343; see *Hopkinson* v. *Salembier*, 7 Dowl. 493.

(*h*) *Cotes* v. *Michill*, 3 Lev. 20; *Moravia* v. *Sloper*, Willes, 30; *Andrews* v. *Marris*, 1 A. & E. 17, N. S.

(*i*) *Morse* v. *James*, Willes, 122; *Philips* v. *Biron*, 1 Stra. 509.; *Smith* v. *Bouchier*, 2 Stra. 993; *Andrews* v. *Marris*, 1 A. & E. 17, N. S.

(*k*) *Slack* v. *Brander*, 1 Esp. 42; *Price* v. *Peek*, 1 Bing. N. C. 380; *Smart* v. *Hutton*, 2 N. & M. 426; *Ackworth* v. *Kempe*, 1 Doug. 40; *Smith* v. *Innes*, 4 M. & S. 360; *Coles* v. *Gum*, 1 Bing. 424; *Cole* v. *Hindson*, 6 T. R. 324; *Shadgett* v. *Clipson*, 8 East, 328; *Hoye* v. *Bush*, 2 Scott, N. R. 86.

officer's employment in the sheriff's service, the sheriff will not be liable, but only the officer, who actually is guilty of the offence (*l*). Neither the attorney nor his client is responsible for the mode of execution, as it is not to be presumed that they authorised an illegal act, and this rule prevails even though the attorney, when placing the writ in the hands of the officer, were fully persuaded that he would be likely to execute it out of his jurisdiction (*m*); but should he accompany the officer, or direct him where to go, he will be a joint trespasser (*n*).

V. As the officer is not a trespasser, and can justify, except the process be void, or his mode of executing it be illegal, it would seem to follow, that except in such cases, if in endeavouring to make an arrest he is resisted and slain, it is murder; but if the party resisting be slain, the officer is certainly not guilty of more than manslaughter. If, however, the arrest be void or illegal, and the party, not able otherwise to escape, slay the officer, it is only manslaughter at the most; and if the officer slay the party resisting, it will be murder (*o*).

(*l*) See cases *ante*, n. (*k*).

(*m*) *Sowell* v. *Champion*, 6 A. & E. 407.

(*n*) See *Meredith* v. *Flaxman*, 5 C. & P. 99; and also Lush's Practice, p. 162.

(*o*) See Foster, Crown Law, 311; Hawk. P. C. v. 1, p.

Thus, where a person having obtained a warrant directed to a sheriff's officer, struck out the officer's name and inserted his own in its stead, and he was shot by the defendant in arresting him, it was holden not to be murder, as the arrest was illegal, but at the most only manslaughter (*p*).

VI. Wherever sheriff has such a right to seize under a *fi. fa.*, that he can justify in an action against him, he can also convey a valid title to a purchaser of the goods seized (*q*). In *Jeanes* v. *Wilkins*, where a *fi. fa.* was executed, while defendant was in custody on a *ca. sa.*, it

103, (ed. 1824); and Watson on Sheriff, p. 63; *Finch* v. *Cocken*, 2 C. M. & R. 203; 3 Dowl. 678, *S. C.*; *Hoye* v. *Bush*, 2 Scott's N. R. 86; see *per* Bayley, J., *The King* v. *Weir*, 1 B. & C. 288; *per* Lawrence, J., *Cole* v. *Hindson*, 6 T. R. 234; *Curvan's* case, 1 Moody, C. C. 132; *King* v. *Hood*, 1 R. & M. C. C. 281; see *Cook's* case, 1 Hale, P. C. 458; Roscoe's Criminal Evidence, p. 622; 1 East, P. C. 310. If the process be defective in the frame of it, as if there be a mistake in the name of the party, or if the name of such person or the officer be inserted without authority and after the issuing of the process, or the officer exceed the limits of his authority and is killed, this will amount to no more than manslaughter in the person whose liberty is so invaded. Foster's Cr. Law, p. 312.

(*p*) See this case related by Lord Kenyon, in *Housin* v. *Barrow*, 6 T. R. 123.

(*q*) *Doe* v. *Thorn*, 1 M. & S. 425; *Doe dem. Batten* v. *Murless*, 6 Id. 110; *Jeanes* v. *Wilkins*, 1 Ves. 194; *Anon.*, Dyer, 363 a; *Manning's* case, 8 Rep. 94 b.

was decided that a good title could be derived from the sheriff. "To avoid the sale and title of the defendant," said Lord Hardwicke in that case, "it must be proved that the *fi. fa.* was void and conveyed no authority to the sheriff; for it might be irregular, and yet, if sufficient to indemnify the sheriff, *so that he might justify in an action of trespass*, he might convey a good title notwithstanding the writ might afterwards be set aside . . . otherwise it would be very hard, if it should be at the peril of purchaser under a *fi. fa.* whether the proceedings were regular or not." And where the sheriff sold a term for years under a *fi. fa.*, and afterwards judgment was reversed on error, it was holden that the money, and not the term, should be restored, because it was legally sold (*r*); but on an *elegit*, as the land itself is delivered to the plaintiff, that on reversal of judgment shall be given up (*s*). If, however, the execution be void or illegal, it is no foundation for a title. Hence,

(*r*) *Anon.*, Dyer, 363 a., and cases cited on the margin; and see Bac. Ab. "Execution," Q. In the case of an outlawry, directly it is reversed it is void *ab initio*, and the rights of all parties are restored to the same situation as if no outlawry had taken place, *St. John's College*, 7 T. R. 264; *Dr. Drury's* case, 8 Rep. 143; and on such reversal, a term shall be restored, though sold to the king. *Eyre* v. *Woodfine*, Cro. Eliz. 278; and see 5 Rep. 90 b.

(*s*) *Goodyere* v. *Ince*, Cro. Jac. 246; *Bathurst's* case, Dyer, 363, in marg.; *Manning's* case, 8 Rep. 94 b.

if the sheriff, under an execution against A., sell the goods of B., he is liable to the latter (*t*); and where the tenant had removed fixtures belonging to the landlord, and they were seized and sold by the sheriff, the landlord, it was decided, could maintain trover for his property against the purchaser (*u*).

VII. As the law obliges no man to render himself liable to an action, or to commit a trespass, the sheriff is not bound to execute void process, and no action lies against him for refusing to do so; but he cannot refuse on the ground of its being irregular (*x*). And where the de-

(*t*) *Farrant* v. *Thompson*, 3 Stark. N. P. C. 130; 5 B. & Ald. 826; 2 D. & R. 1, *S. C.*

(*u*) *Id.*; and see *Lock* v. *Sellwood*, 1 G. & D. 366.

(*x*) *Jackson* v. *Hunter*, 6 T. R. 73; *Brunskill* v. *Robertson*, 9 A. & E. 840; and see case of *The Marshalsea*, 10 Rep. 76 a; and Atkinson's Sheriff Law, p. 8. The sheriff is not always bound to execute process, even though its execution might not subject him to an action. Thus, he should not execute *mesne* process (it is otherwise, if it be final) where the defendant is incorrectly named; for if defendant were commonly known by that name, so as to afford a justification to the sheriff, yet he is not liable for not arresting him. *Morgans* v. *Bridges*, 1 B. & Ald. 647. And if defendant were not so known and be arrested, sheriff is liable at his suit. *Cole* v. *Hindson*, 6 T. R. 234. And though no action lies for detaining a privileged person, yet he may discharge him. *Tarlton* v. *Fisher*, Doug. 672; and see Ld. Raym. 775; Cro. Eliz. 467, 877. If a *ca. sa.* issue without any judgment to warrant it, sheriff is not liable to an action for executing it, and should he

fendant has estopped himself from taking advantage of the objection, as by executing a warrant of attorney, and allowing judgment to be entered against him by a wrong name, the sheriff is bound to execute the process though it contain the objectionable matter (*y*).

VIII. The sheriff is not liable for the escape of a prisoner taken in execution on a void judgment or process; he is liable if the judgment or process were erroneous, informal, or irregular (*z*), but if the judgment be reversed, or, it seems, set aside before he pleads, he may plead *nul tiel record* (*a*). Neither is he liable in cases of illegal arrest, as where defendant is taken in a wrong county, or otherwise out of the jurisdiction (*b*).

execute it, he is not liable for an escape. *Wynne* v. *Boughey*, O. Bridg. 573.

(*y*) *Reeves* v. *Slater*, 7 B. & C. 486.

(*z*) *Shirley* v. *Wright*, Salk. 700; *Wynne* v. *Boughey*, O. Bridg. 570; *Gold* v. *Strode*, Carth. 148; *Burton* v. *Eyre*, Cro. Jac. 289; *Bushe's* case, Cro. Eliz. 188; see also 10 Rep. 76 a; Bac. Ab. Sheriff, M. 2; *Wooden* v. *Moxon*, 6 Taunt. 490. Where a court in which judgment is obtained, has cognizance of the same, but proceeds erroneously, the judgment is only erroneous; but if the court has no jurisdiction, it is void. Carth. 148; 10 Rep. 76 a.

(*a*) O. Bridg. 572. And in such actions the judgment must be alleged; and, unless admitted by the plea, it must be proved.

(*b*) See *Duffy* v. *White*, Alcock and Napier, (Irish) 1; *Rogers* v. *Jones*, 7 B. & C. 86; *Brazier* v. *Jones*, 8 B. & C. 130;

IX. On the arrest depends the bail-bond, which is void if the *capias* be void: if the arrest be irregular and set aside, the bail-bond will be ordered to be given up and cancelled; but if not set aside, and an action be brought on the bail-bond, the irregularity cannot be pleaded in discharge, though the matter rendering it void may be pleaded (*c*).

X. If the *ca. sa.* against the principal be void, the bail may plead it in discharge of proceedings against them, because it is in effect as if no *ca. sa.* had issued against him. Either of these defences can only be pleaded, and it is no ground for motion to set aside the proceedings (*d*); but it is different if the *ca. sa.* be only irregular (*e*).

Cro. Eliz. 877; 11 Mod. 50; Hob. 202. On a void execution, it would also probably be holden, that the sheriff is not entitled to poundage, see *per* Parke, B., *Chapman* v. *Bowlby*, 1 Dowl. 84, N. S.; as it has been holden that he is not liable to an action for not paying the landlord one year's rent, under 8 Anne, c. 14, s.1; *Hann* v. *Capell*, Barnes, 199; see *Forster* v. *Cookson*, 5 Jurist, 1083; for both of these depend on the fact of a levy being made, and in law, if void, it would be no levy.

(*c*) *Jackson* v. *Hunter*, 6 T. R. 71; *Tucker* v. *Goldburne*, 3 Mod. 78, where it is said, "The *capias* gives life to the bond;" *Estwicke* v. *Cooke*, 2 Ld. Raym. 1557; and see *Hart* v. *Weston*, 5 Burr. 2586; *Finch* v. *Cocken*, 3 Dowl. 678.

(*d*) *Philpot* v. *Manuel*, 5 D. & R. 615.

(*e*) *Gurney* v. *Hopkinson*, 3 Dowl. 190; 1 C. M. & R. 587, *S. C.*; and *per* Parke, B., "The proceeding against the principal is *in invitum*. The bail are volunteers; they cannot

XI. And as a general rule, if there be a defect in some previous proceeding, which defect is matter of substance going to the merits of the case, it may and should be pleaded to an action; but if it be a mere matter of practice amounting to no more than an irregularity, it is not pleadable (*f*). Hence, where it was questionable whether an action on a judgment could be sustained on the ground of plaintiff's having previously elected to proceed on the judgment by execution, the Court would not decide the point on a summary application (*g*). We have seen that bail must plead that no *ca. sa.*, or a void *ca. sa.*, issued against principal; and so should they that it issued into a wrong county; and *per* Ellenborough, C. J., "We must take notice of the practice of the Court in a case like this, where it is the very subject matter of dispute and is put in issue.

be allowed to say the writ is irregular. If it be altogether void, they are not without remedy." And see *Cholmondeley* v. *Bealing*, 2 Ld. Raym. 1096; *Campbell* v. *Cumming*, 2 Burr. 1187; *Dudlow* v. *Watchorn*, 16 East, 41; *Cholmley* v. *Veal*, 6 Mod. 304; *Smith* v. *Webb*, 2 M. & W. 879.

(*f*) See cases in the last note, and *Elliot* v. *Lane*, 1 Wils. 334; *Cherry* v. *Powell*, 1 D. & R. 50, where, *per Curiam*, "Mere practice is certainly not pleadable." *Warmsley* v. *Macey*, 5 Moore, 168; *Ball* v. *Swan*, 1 B. & Ald. 393.

(*g*) *Hesse* v. *Stevenson*, 1 N. R. 133.

(*h*) *Dudlow* v. *Watchorn*, 16 East, 39.

For what purpose is the issuing of the *ca. sa.* at all in this instance, except as matter of practice" (*i*); but it is no plea that the *ca. sa.* did not lie four days in the sheriff's office (*k*).

Having now considered the chief distinctions between nullities and irregularities, it remains to consider some incidents that pertain to the latter alone, such as the mode of taking advantage of them, the awarding of costs, and the imposition of terms and permission to amend.

Rules applying to irregularities alone.

Mode of proceeding upon them.

If the party who has committed the irregularity be satisfied of the fact, he may, after service of the rule *nisi* or summons, save further expense by acknowledging the defect, desiring the opposite party not to make the rule absolute, and tendering the costs already incurred; or if he discover the defect before service of the rule or summons, he may save all expense by such notice (*l*). Where the plaintiff's attorney, on the day after service of a rule *nisi* upon him to set aside his declaration, offered to pay the costs, the Court set it aside on *payment by the*

(*i*) Referring to this case, the Court, in *Cherry* v. *Powell*, said, "The very merits of the case might depend upon the venue."

(*k*) *Philpot* v. *Manuel*, 5 D. & R. 615.

(*l*) *Beeston* v. *Beckett*, 4 M. & R. 100; *Halton* v. *Stocking*, 1 Dowl. 296; *Hargrave* v. *Holden*, 3 Dowl. 176; *Clarke* v. *Crockford*, Id. 693; *Robinson* v. *Stoddart*, 5 Dowl. 266.

defendant's attorney of the costs incurred subsequently to the offer (*m*).

The more liberal practice in the opposite party, when he discovers an irregularity, is to give notice of it to the party in fault, who should immediately return an answer to the effect that he is ready to amend and pay costs, if any incurred, and he should actually tender the amount.

Who may apply.

The party legally interested in the proceeding may apply to set it aside for irregularity,

Assignees.

Assignees of a bankrupt may avail themselves of an irregular step taken against him, as of a variance between a judgment and a writ of execution against the bankrupt (*n*). So bail may apply to have the bail-bond cancelled, or an *exoneretur* entered on the bail-piece, for an irregularity against the principal affecting their liability (*o*).

Bail.

Bankrupt.

A defendant, who had become bankrupt, and obtained his certificate after trial and verdict against him, was allowed to set it aside for want of a sufficient notice of trial, though his estate was insolvent, and his assignees were no parties to the application (*p*); Parke, B., observing, "He still has an interest in the question, for

(*m*) *Beeston* v. *Beckett*, 4 Man. & Ryl. 100.
(*n*) *Webber* v. *Hutchins*, 8 M. & W. 319.
(*o*) *Hayward* v. *Ribbans*, 4 East, 310.
(*p*) *Shepherd* v. *Thompson*, 9 M. & W. 110.

though the debt may be barred by his certificate, he may reasonably object to its being said that it was discharged thereby, when perhaps he might be able to prove upon the trial that no debt at all was due from him."

Outlaw.

Though an outlaw cannot enforce a legal right of his own, yet he may protect himself from the claims of others, and therefore he may apply to set aside proceedings against himself, as an irregular *scire facias* (*q*), or *capias ad satisfaciendum* (*r*), or attachment (*s*).

Tenant in possession.

An application to set aside an irregular execution in ejectment may be made by the tenant in possession, who has been served with declaration but has not appeared, judgment having been signed against the casual ejector; but costs cannot be awarded against the lessor of the plaintiff without consent (*t*).

When to apply.

A party cannot apply to set aside any process before it has been served or executed.

How to apply.

The application in the first instance as a general rule should be made to a Judge at cham-

(*q*) *Walker* v. *Thelluson*, 1 Dowl. 578, N. S.

(*r*) *S. C.* 1 Dowl. 277, N. S.

(*s*) *Hawkins* v. *Hall*, 1 Beav. 73.

(*t*) *Goodtitle dem. Murrell* v. *Badtitle*, 9 Dowl. 1009, in which case it was agreed that costs should be paid, on the tenant undertaking not to bring an action on such execution. See also *Doe dem. Vernon* v. *Roe*, 7 A. & E. 14; *Goodright dem. Ward* v. *Badtitle*, 2 W. Bla. 763.

bers (*u*); if it be refused, the applicant may then move the Court, or under special circumstances the same Judge may open the order he has made, or reconsider the point; but the party should never apply to a different Judge at chambers on the same matter.

Judge's summons and rule *nisi*.

The summons, or rule *nisi*, must accurately specify the proceeding which is to be set aside, and the irregularity for which it is to be set aside (*x*).

Writ and copy.

On application to set aside a writ, defendant cannot notice a defect in the copy, the writ itself being correct (*y*), and a defect in the copy does not warrant the setting aside of the writ (*z*); but as defendant can seldom ascertain whether the latter be correct or not, if the defect be in the copy, he should apply in the alternative to set aside the writ, or the copy and service thereof, or the service alone, but never to set aside the copy alone without the service also, for it is informal and nugatory to do so (*a*).

(*u*) See *Robarts* v. *Lemon*, 6 Scott, 576; Lush's Prac. 328, 389.

(*x*) By direction of the Judges, see *Anon.*, 1 Ch. R. 126. It is not necessary to use the term irregularity in the rule, if it appear on the affidavit. *Harvey* v. *Bennett*, 2 Chit. R. 238.

(*y*) *Huggett* v. *Parkin*, 1 Bing. 65.

(*z*) *Chalkeley* v. *Carter*, 4 Dowl. 480.

(*a*) *Kenny* v. *Bishop*, 9 Dowl. 57; 2 Scott's N. R. 203, *S. C.*; *Crow* v. *Field*, 8 Dowl. 231; *Truslove* v. *White-*

Service. If the irregularity be merely in the service, that should be the matter referred to (*b*); though, as the copy must fall to the ground, if the service be set aside, it is not asking too much to set aside both copy and service (*c*).

Declaration and writ. If the writ be "on a special action," and the declaration be "on promises," as the writ is irregular, a motion to set aside the *declaration* will be refused (*d*), and on a summons to have

Bail-bond and capias. the bail-bond cancelled for irregularity, a defect in the *capias* will not be entertained (*e*). Where the cause specified in the rule is irregularity, the party cannot raise an objection on the ground

Bad faith. of bad faith (*f*). If it be sought to set aside

Pleas pleaded under a rule. pleas, which have been pleaded under a rule or order to plead several matters, the application should be to discharge or rescind the rule or order (*g*). So if the objection be that the *capias* has issued on insufficient affidavits, the application must be to rescind or set aside the order for arrest and not the *capias* (*h*); and on

church, 8 Dowl. 837; 1 Scott's N. R. 415, *S. C.*, and cases in note; *Tadman* v. *Wood*, 4 A. & E. 1011; *Chalkeley* v. *Carter*, 4 Dowl. 480.

(*b*) *Anon.*, 1 Dowl. 654; *Hasker* v. *Jermaine*, 1 C. & M. 408.

(*c*) *Argent* v. *Reynolds*, 6 Dowl. 480.

(*d*) *Moore* v. *Archer*, 4 Dowl. 214.

(*e*) *Yeates* v. *Chapman*, 3 Bing. N. C. 262.

(*f*) *Smith* v. *Clarke*, 2 Dowl. 218.

(*g*) *Post*, Plea.

(*h*) *Post*, Arrest.

the same objection to the issuing of a *distringas* apply to discharge the rule for such issuing(*i*). So if the ground of objection to an award be that the order of reference was improperly obtained, the application should be to set aside the order itself, and not the award (*k*).

Affidavit of debt.

Where on motion to discharge defendant on the ground of there having been no affidavit of debt, it appeared that there was an affidavit, but that when searched for by defendant's attorney, it was mislaid at the office, defendant was allowed to object to the form of the affidavit (*l*).

Stay of proceedings. Rule nisi.

In order to obtain a rule with a stay of proceedings, a notice of the intended motion must be given to the opposite party previous to moving in the Exchequer and Common Pleas, but not, it seems, in the Queen's Bench.

In the Exchequer a two days' notice is requisite for such stay.

The rule *nisi*, when it states that "all proceedings shall be in the mean time stayed," suspends the proceedings for all purposes until the rule be discharged. If obtained by the *plaintiff*, the defendant is allowed the same time after the rule is disposed of to take the next step that he had when the rule *nisi* was served upon him; but if the rule were obtained by the

(*i*) *Post*, Distringas.
(*k*) *Sackett* v. *Owen*, 2 Chit. R. 39.
(*l*) *Edgar* v. *Watt*, 1 H. & Wol. 108.

defendant, then he must take the next step on the same day the rule is disposed of, if discharged; but he is allowed the whole of the day to do so. He will not, however, be bound to do so, if the rule *nisi expressly* provide (as it sometimes does) that the defendant shall have the same time to take the next step after the rule is disposed of as he had at the time when he obtained it (*m*).

Judge's summons.

Operating as stay of proceedings.

As a general rule, a summons does not operate as a stay of proceedings unless it be a part of the application—"Why in the mean time all further proceedings should not be stayed," nor does an order unless it be so expressed. The exceptions are where the applicant has to take the next step, and the application relates to the time or mode of taking that step, as where the summons is for time to plead; for leave to plead several matters; to strike out a count, &c., cases where a stay of proceedings is necessarily implied (*n*). Where the object of the summons is collateral, as to discharge defendant out of custody on entering an appearance, &c., it will not in general operate as a stay of proceedings (*o*). A summons never operates as a stay

(*m*) See Chit. Arch. Prac. p. 1045, and cases there cited; also 3 Chit. Gen. Prac. 571.

(*n*) Lush's Prac. p. 803; and see *Hodgson* v. *Caley*, 8 Dowl. 318.

(*o*) *Per Cur.* M. T. 28 Geo. III. K. B., Tidd (9th ed.), 470.

except from the time when it is *attendable*, and to make it have the effect from that time, when it is to set aside proceedings for irregularity, there are, it seems, three essentials, first, that the words "why in the mean time all proceedings should not be stayed" should be inserted (*p*). Secondly, that it be made returnable; *i. e.* attendable in due time and before the proceeding which it is sought to stay can take place; thus, where a summons to set aside a judgment for irregularity was not returnable until *three* o'clock, when notice of inquiry was for that day, it was held no stay, as the writ might have been executed at eleven, though, in fact, it was not executed until four (*q*). Thirdly, it must be duly followed up, by obtaining, drawing up, and serving the judge's order.

If irregularity consist in matter of fact, as service or delivery, an affidavit of the circumstances will be necessary; and though it be in Affidavit.

(*p*) See *Williams* v. *Roberts*, 1 Gale, 56, where these words held necessary for this purpose in an order to tax attorney's bill.

(*q*) *Roberts* v. *Cuttill*, 4 Dowl. 204; but where the summons for time is returnable after the judgment office opens, if the plaintiff does not sign judgment before the return, he must then wait until the summons has been either abandoned or disposed of. See Lush's Prac. p. 803. See *Trego* v. *Tatham*, 2 Man. & G. 509, where a summons to set aside a judgment for irregularity stayed the making absolute of a rule to compute.

the form of a proceeding, and apparent on the face of it, an affidavit is often advisable to identify such proceeding. The affidavit must show a clear case for relief; and, therefore, where on a motion to set aside a judgment on a *cognovit* containing an agreement, that if any error were in the accounts, it should be rectified, the affidavit alleged that an error had been discovered, it was holden insufficient, as not stating what the error was, whether in amount or otherwise (*s*).

An irregularity will not be assumed before it is proved. Thus an affidavit to hold to bail being good in one distinct part, and bad in another distinct part, it is for defendant to show that he was arrested on the bad part, before he will be entitled to a discharge (*t*).

If defendant seek to set aside proceedings on the ground of not having been served with process, it must appear by his affidavit, that he is the defendant in the cause (*u*). An affidavit to set aside proceedings for an *irregular service*, need not state that no other copy of the process has come to the knowledge of defendant (*x*), though it must be so stated, where the objec-

(*s*) *Preedy* v. *Lovell*, 4 Dowl. 671.

(*t*) *Canna* v. *Rickby*, 3 M. & W. 68.

(*u*) *Johnson* v. *Smallwood*, 2 Dowl. 588.

(*x*) *Wintle* v. *Hogg*, 2 W. W. & H. 63; 7 Dowl. 623, *S. C.*

tion is, that there has been *no service* whatever (*y*).

Where a party has been served with an informal writ, in which he is misnamed, and he has not appeared, the affidavit to set it aside should be entitled with his right name, stating that he was sued by a wrong name; therefore, where J. A. E. was served with a writ of summons, wherein he was described as J. E., the affidavit to set it aside was holden rightly entitled in a cause of A. B. *v.* J. A. E., sued as J. E. (*z*); and so in an application to have the bail-bond cancelled, where the arrest was by a wrong name (*a*). The addition or degree, or it seems the abode, of the deponent need not be inserted where he is *a party to the cause*, but he may be described merely as plaintiff or defendant (*b*).

Successive applications.

The applicant is bound fully and fairly to state his case, and not to keep back part of his objections for a subsequent application, and he is supposed to waive all those, which he does not advance on the first opportunity.

(*y*) *Giles* v. *Hemming*, 6 Dowl. 325.

(*z*) *Jones* v. *Eldridge*, 11 Law Journal, 192, N. S.; 1 Dowl. 710, N. S., *S. C.*

(*a*) *Finch* v. *Cocker*, 2 Dowl. 383.

(*b*) *Shirer* v. *Walker*, 9 Dowl. 667; and see Reg. H. T. 2 Will. IV. s. 5; and see, *post*, "Bail," as to entitling affidavits used by them.

Where a summons was taken out to set aside a notice of trial, and the only objection was the want of jurisdiction, the Court afterwards refused to interfere on the ground of no day for the trial (which was before a recorder) being stated in the notice (*c*); and when it was sought to set aside execution, because no written notice of taxation had been given, but nothing was said about a writ of error then in existence and the allowance whereof must have been known to defendant, he was not, on a subsequent application, allowed to shift his ground, and to rely on the writ of error having been sued out before final judgment was signed (*d*).

Costs.

It is now settled, that a Judge at chambers has power to give costs (*e*), though the practice as to his giving them is very uncertain (*f*). They are entirely in his discretion, and should he refuse them, an attempt must not be made to obtain them from the Court (*g*).

As a general rule, if it be moved to set aside proceedings for irregularity with costs, the rule,

(*c*) *Farmer* v. *Mountford*, 1 Dowl. 366, N. S.

(*d*) *Thorpe* v. *Beer*, 1 Chit. R. 124; and see *Alexander* v. *Porter*, 1 Dowl. 299, N. S.; *Bicknell* v. *Wetherell*, 1 G. & D. 460.

(*e*) *Hughes* v. *Brand*, 2 Dowl. 131; *Doe d. Prescott* v. *Roe*, 1 Dowl. 274; *Bridge* v. *Wright*, 2 A. & E. 48.

(*f*) *Davy* v. *Brown*, 1 Scott, 384.

(*g*) *Id.*

if discharged, will be discharged with costs (*h*); the only exceptions being, if it be opposed in the first instance (*i*), or sometimes if it be discharged on a merely technical objection, as the entitling of the affidavit, &c., without going into the merits (*k*). If, however, the rule be discharged, because the addition of deponent (who is not a party to the cause) (*l*), is omitted in the affidavit in support of the application, it will be discharged with costs (*m*). If the rule be made absolute, it is in general with costs against the party, who has been irregular; but not so, if the rule *nisi* were not moved *with costs* (*n*).

(*h*) *Willis* v. *Ball*, 1 Dowl. 303, N. S.; *Quilters* v. *Neeley*, 9 Dowl. 141; *Esdaile* v. *Davis*, 6 Dowl. 465; *Anon.*, 1 Chit. R. 398, n.; *Tilley* v. *Henley*, Id. 136. And by R. M. 37 Geo. III. it shall be deemed to have been so discharged, even though the rule discharging it contain no special directions on the subject. See Chit. Arch. Pr. p. 1193.

(*i*) *Fitch* v. *Green*, 2 Dowl. 439; *Grove* v. *Parker*, Id. 628; *Anon.*, 2 Chit. R. 241. "So that it is unfortunately the pecuniary interest of a practitioner not to show cause in the first instance, even in the clearest case." 3 Chit. Gen. Prac. p. 511, (*f*).

(*k*) *Harris* v. *Matthews*, 4 Dowl. 608; *Preedy* v. *Lovell*, Id. 671. In *Clothier* v. *Ess*, 2 Dowl. 731; and *Wood* v. *Critchfield*, 3 Tyr. 235; rules *nisi* were discharged with costs, for defects in the title of the affidavits on which they had been procured.

(*l*) *Ante*, p. 43, n. (*b*).

(*m*) *Anon.*, 1 Wol. P. C. 57. The addition is required by Reg. H. T. 2 Will. IV. s. 5.

(*n*) *The King* v. *The Sheriff of Middlesex*, 2 Dowl. 5.

that such a power existed. But the practice has not been adopted, and perhaps it is not convenient that it should

If the party who obtained the rule succeed only as to part, it seems he will not be allowed costs (*o*).

Irregular proceedings against a sheriff will be set aside with costs (*p*). A plea in abatement, it seems, is set aside without costs (*q*). Where a party applies to the Court when he ought to have applied to a Judge at chambers, he will not in general be allowed costs (*r*). Where costs are awarded, the party apparently is not bound to pay them before he commences a new action (*s*).

Terms of not bringing an action.

Upon setting aside proceedings for irregularity, the Courts have frequently imposed the terms of not bringing any action; but it is now decided that they have no power to do so without the consent of the party, where it is a matter of right to set aside the proceedings (*t*), and

(*o*) See *Aliven* v. *Furnival*, 2 Dowl. 49.

(*p*) See Chit. Arch. Prac. p. 564.

(*q*) *Poole* v. *Pembrey*, 1 Dowl. 693.

(*r*) *Vaughan* v. *Trewent*, 2 Dowl. 299. So if the opposite party gave notice that he was ready to yield the point, and tendered any expenses incurred. *Ante*, p. 34.

(*s*) *Dawson* v. *Sampson*, 2 Chit. R. 146. If a judgment be set aside *expressly without costs*, they cannot be recovered by way of aggravation of damages in trespass for seizing goods on such judgment. *Loton* v. *Devereux*, 3 B. & Ad. 343. But if *no order* whatever were made concerning the costs, they may be thus recovered. *Pritchet* v. *Boeny*, 1 C. & M. 777.

(*t*) *Adlam* v. *Noble*, 9 Dowl. 322; *Cash* v. *Wells*, 1 B. & Ad. 375; *Abbot* v. *Greenwood*, 7 Dowl. 534; *Lorimer* v.

an application on the ground of irregularity appears to be always *ex debito justitiæ* (*u*). If, however, the party will not consent to forego his right of action, the costs of the application will seldom be granted to him (*x*).

In *Adlam* v. *Noble*, a warrant of attorney, and judgment and execution thereon, had been set aside on account of non-compliance with 1 & 2 Vict. c. 110, ss. 8 and 9. The rule had not been moved nor made absolute with costs, but the defendant had been restrained from bringing any action. It was now moved, and successfully, to strike out so much of the rule as imposed this restriction; and, in argument, reference having been made to a late decision of Mr. Justice Coleridge, in *Fountaine* v. *Hall*, as being unfavourable to this motion, Mr. Justice Williams said,—"I have spoken to my brother Coleridge about that case, and he informs me that it was referred to him for the purpose of saying what ought to be done.... It must be considered as having been done with the tacit consent of the defendant. My brother Coleridge, however, had *no doubt in his own mind*,

Lule, 1 Chit. R. 134; *Wentworth* v. *Bullen*, 9 B. & C. 840; *Loton* v. *Devereux*, 3 B. & Ad. 343; *Pritchet* v. *Boeny*, 1 C. & M. 775.

(*u*) See *per* Patteson, J., in *Abbot* v. *Greenwood*, 7 Dowl. 534.

(*x*) Cases *suprà*; and see *Morris* v. *Hancock*, 1 Dowl. 325, N. S.

that if the defendant had objected, the term could not have been imposed." And in *Cash* v. *Wells*, on motion to set aside with costs a judgment signed against good faith, the defendant refusing to accept terms of not bringing any action, they were omitted; and, *per* Bayley, J.—"We cannot impose them without the defendant's consent. He applies to us, *ex debito justitiæ*, to have proceedings set aside, which are against good faith. We are not compelled, however, to give him the costs of the rule; and unless he will consent not to bring any action, we make this rule absolute without costs." And on discharging defendant from an illegal arrest (*y*), Gaselee, J., offered to the applicant the costs, provided he would undertake not to bring any action; the offer was refused, and the action was brought.

Amendment: An amendment of a practical proceeding will in general be allowed where the defect in itself is not deemed sufficiently material for setting aside the proceedings, or where the situation of the parties will not be changed by it and where otherwise there would be a failure of justice, as in the case of the debt being barred by the

(*y*) *Pritchet* v. *Boeny*, 1 C. & M. 775. And when the Courts were presumed to have this power, it was a rule that if the terms of not bringing an action were not imposed at the time of setting aside the proceedings, the party could not afterwards be restrained. *Abbot* v. *Greenwood*, 7 Dowl. 534.

statute of limitations (*z*). The Courts do not allow an amendment merely to save costs (*a*).

Particular instances of amendment will be found under their respective titles in the Second Part.

As a general rule an amendment will not be allowed— When not allowed.

1. To the prejudice of third parties, whose rights may have intervened as assignees of a bankrupt (*b*), or bail (*c*).
2. A void proceeding will not be amended (*d*).
3. Nor a plea in abatement (*e*).
4. The *copy* of a writ after its service, being beyond the power of the Courts, cannot be amended (*f*).

Though a party by his silence may appear to have waived the objection, the Court will not permit an irregularity, if brought under its

(*z*) See *Plock* v. *Paeheo*, 1 Dowl. 383, N. S. Where an irregular proceeding is amendable as of course, the Courts will never set it aside. See *Poppins* v. *Smith*, 7 Bing. 434.

(*a*) *Per* Alderson, B., *Bilton* v. *Clapperton*, 1 Dowl. 387, N. S.

(*b*) *Webber* v. *Hutchins*, 8 M. & W. 319; *Hunt* v. *Pasman*, 4 M. & S. 329.

(*c*) *Inman* v. *Huish*, 2 N. R. 133; *Marsh* v. *Blackford*, 1 Chit. R. 323.

(*d*) *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

(*e*) *Dockary* v. *Lawrence*, Cas. Prac. C. P. 29; and see Lush's Prac. p. 407.

(*f*) *Byfield* v. *Street*, 2 Dowl. 739; *Nicoll* v. *Bain*, 10 Bing. 339; *Eccles* v. *Cole*, 1 Dowl. 34, N. S.

notice, to pass uncorrected; and, therefore, where counsel, while in support of bail, stated there was an irregularity in the notice of justification, the Court stayed the proceedings, and allowed four days for an amendment (*g*).

(*g*) *Dogherty's Bail*, 3 Dowl. 116.

PART II.

It is proposed now to consider the chief instances in which defects have been holden to be null or irregular, the mode and time of taking advantage of them or of waiving them, and when they may be amended.

The titles under which they occur have been arranged alphabetically for the sake of facility in reference.

ABATEMENT, PLEA IN.

When a nullity.

Too late.

Pleas in abatement, being little favoured in the law, and not amendable, are frequently holden to be null for defects, which in other proceedings might be regarded as merely irregular. If a plea in abatement or to the jurisdiction be pleaded after four days from the delivery or the notice of declaration, the plaintiff may treat it as a nullity, and sign judgment after the full time for pleading in bar has elapsed, unless it be withdrawn by leave of the Court or a Judge, and a plea in bar be delivered (*a*). If it be partly in bar and partly in abatement, it

(*a*) *Brandon* v. *Payne*, 1 T. R. 689; *Martindale* v. *Harding*, 1 Chit. R. 716, n.; *Nollekin* v. *Severn*, 1 Dowl. 329. Judgment, it seems, should not be signed before the expiration of the full time allowed for pleading in bar. See *post*, "Plea."

must, it seems, be pleaded within the four days (*b*).

Title and names.

If entitled in a wrong Court, or if it misstate the names of the parties, it may perhaps be treated as a nullity (*c*); but, until a decision is given to this effect, it will be safer to apply to the Court to set it aside, and for leave to sign judgment.

Affidavit.

If it be not verified by affidavit, (unless the matter of the plea appear upon the face of the record,) or if the affidavit be insufficient, the plea is a nullity (*d*). The affidavit must strictly agree with the plea, and a variance in the Christian name entitles plaintiff to sign judgment (*e*). And where the affidavit stated that "the affidavit hereunto annexed," instead of "the plea," was true, judgment was holden properly signed (*f*); and so, where nonjoinder, under 3 & 4 Will. IV. c. 42, s. 8, was pleaded, but the affidavit did not state the actual residence of the omitted party at the time of making the

(*b*) *Davison* v. *Moreton*, 1 Chit. R. 716.

(*c*) Lush's Prac. p. 408.

(*d*) *Hughes* v. *Alvarez*, 2 Ld. Raym. 1409; *Johnson* v. *Popplewell*, 2 C. & J. 544; *Gray* v. *Sidneff*, 3 B. & P. 397; *De la Fontaine* v. *Myngs*, Cas. Pr. C. P. 38, and n.; *Sherman* v. *Alvarez*, 1 Stra. 639; *Dobbin* v. *Wilson*, 3 N. & M. 260; *Davidson* v. *Chilman*, 1 Bing. N. C. 297; and see *Lang* v. *Comber*, 4 East, 348; and Tidd, (9th ed.) 640.

(*e*) *Poole* v. *Pembrey*, 1 Dowl. 693.

(*f*) *Garratt* v. *Hooper*, 1 Dowl. 29.

affidavit, the plea was set aside, and plaintiff was allowed to sign judgment (*g*). If not annexed to the plea, the affidavit must be entitled in the cause, and specially set forth the facts contained in the plea (*h*); and even if annexed, it is the practice, and certainly safer, so to entitle it, though it may be unnecessary (*i*). If entitled, however, in either case a mistake is fatal (*k*). The plea may be treated as a nullity if the affidavit be sworn before the declaration is delivered or filed (*l*).

The affidavit may be made by defendant's attorney (*m*), and if sworn before him, it does not render the plea a nullity, so as to entitle plaintiff to sign judgment upon it (*n*); but it may be set aside (*o*).

In several cases where the affidavit has been insufficient, the Courts have refused to set aside

Setting aside plea in abatement.

(*g*) *Wheatley* v. *Golney*, 9 Dowl. 1019.

(*h*) See a special statement in affidavit, *Dobbin* v. *Wilson*, 3 N. & M. 260.

(*i*) *Prince* v. *Nicholson*, 5 Taunt. 333.

(*k*) *Richards* v. *Setree*, 3 Price, 197, where *Prince* v. *Nicholson* is doubted.

(*l*) *Bower* v. *Kemp*, 1 Dowl. 281; *Johnson* v. *Popplewell*, 2 C. & J. 545: in the latter case judgment was set aside on affidavit of merits and payment of costs.

(*m*) *Lumley* v. *Forster*, Barnes, 344.

(*n*) *Horsfall* v. *Matthewman*, 3 M. & S. 154, to which Lush (Prac. p. 409) adds, *sed quære?*

(*o*) As it was in *Cooper* v. *Archer*, 12 Price, 149.

the plea, saying plaintiff might treat it as a nullity (*p*); but in the majority of cases, and those of more modern date, they have set it aside.

Nonpros. Where judgment of *nonpros* was signed for want of a replication to a null plea in abatement, the judgment was set aside (*q*), for it was the same as if no plea had been delivered.

Waiver. Of course keeping a null plea in abatement does not operate as a waiver (*r*); but if the plaintiff were so far to recognize its validity as to reply to it, the defect might be cured.

Amendment. A plea in abatement cannot be amended (*s*).

AFFIDAVIT TO HOLD TO BAIL.

Title in Court. The affidavit to hold to bail must be entitled of the Court in which the action is to be brought (*t*), unless it be sworn before a Judge of the Court (*u*), or by the jurat it appears to have been sworn before a commissioner of the Court (*x*).

(*p*) See *Bray* v. *Haller*, 2 Moore, 213; *Rex* v. *Cooke*, 2 B. & C. 618.

(*q*) *Garratt* v. *Hooper*, 1 Dowl. 28.

(*r*) *Id.*

(*s*) *Dockary* v. *Lawrence*, Cas. Pr. C. P. 29; Tidd, (9th ed.) 638.

(*t*) *Molling* v. *Poland*, 3 M. & S. 157; *King* v. *Hare*, 13 East, 189; and see *Kennett Canal Company* v. *Jones*, 7 T. R. 451.

(*u*) R. H. 2 Will. IV. R. 4.

(*x*) See Lush's Prac. pp. 596, 762.

If the affidavit be made before the writ of summons is sued out, it need not be entitled in any cause (*y*); but it should be so entitled, if made after the issuing of the summons (*z*). In cause.

The Christian and surname of the parties are required in full (*a*), but if the action be on a written instrument in which the party is designated by initials, or a contraction of the Christian or first name or names, it may be followed in the affidavit (*b*); and in other cases defendant shall not be discharged nor bail-bond cancelled for a mistake in the name, where due diligence is shown to have been used to obtain knowledge of the proper name (*c*). Affidavit that Edward Joyce is indebted in a sum due to deponent from George Page Edward Joyce is bad (*d*). Name.

It is now an established rule that the addition or degree of deponent need not be inserted where he *is a party to the cause*, but he may be described merely as plaintiff or defendant (*e*). Addition and degree.

(*y*) *Schelleter* v. *Cohen*, 9 Dowl. 277.

(*z*) *Id.*

(*a*) *Waters* v. *Joyce*, 1 D. & R. 150; *Reynolds* v. *Hankin*, 4 B. & Ald. 536; *Lake* v. *Silk*, 3 Bing. 296; and see "Arrest," and "Capias"—name.

(*b*) 3 & 4 Will. IV. c. 42, s. 12.

(*c*) H. T. 2 Will. IV. R. 32.

(*d*) *Waters* v. *Joyce*, 1 D. & R. 150. See where the Christian and surname transposed in an order of reference, and allowed to be amended, *Price* v. *James*, 2 Dowl. 435.

(*e*) *Shirer* v. *Walker*, 9 Dowl. 667; H. T. 2 Will. IV. R. 5.

Of course it will be otherwise if the affidavit be made before the action is commenced. The same rule seems to apply to the abode of the party (*f*).

Abode.

Statement that defendant is about to quit the country.

It need not state that deponent has probable cause for believing defendant is about to quit the country; it is sufficient if the facts stated enable the Judge to form such belief (*g*).

Cause of action.

The affidavit must expressly show on the face a right of action, and it must be so explicit, direct, and certain in this respect, that perjury may be assigned upon it (*h*). It must be positive as to the debt or other cause of action, and the *consideration* for the debt must be expressly stated. Thus, if it allege defendant to be indebted in a sum due "upon and for the balance of accounts between plaintiff and defendant," it is insufficient (*i*), not averring it to be on an account stated; but if "in £22 and upwards upon the balance of accounts *for goods sold and delivered* to the defendant at his request," it is sufficient (*k*). The exceptions to such certainty are, where it is impossible from the circumstances attending the case to swear positively (*l*),

(*f*) *Shirer* v. *Walker*, 9 Dowl. 667; H. T. 2 Will. IV. R. 5.

(*g*) *Willis* v. *Snook*, 8 M. & W. 147.

(*h*) See *per* Vaughan, B., *Townsend* v. *Burns*, 2 C. & J. 471.

(*i*) *Jones* v. *Collins*, 6 Dowl. 526.

(*k*) *Kenrick* v. *Davis*, 1 Dowl. 347, N. S.

(*l*) *Hobson* v. *Campbell*, 1 H. Bla. 245.

or where plaintiff sues in *autre droit*, as executor or assignee. An affidavit stating two or more distinct causes of action, separate and independent of each other, may be good for one though bad for the other (*m*), unless indeed defendant can show that he was arrested for the whole amount (*n*). Good in part.

So it must be single, that is, not containing two causes of action that cannot be joined, nor two distinct claims at the suit of two plaintiffs (*o*). Single.

It should correspond with the declaration, and also with the writ of summons and the *capias*, in cause of action, and the character, number, and names of the parties; for if not, the defendant and bail may perhaps be discharged (*p*); but the bail will not be discharged for a variance between the *capias* and declaration (*q*). If an interlineation or erasure be *in* the jurat, the affidavit cannot be heard or made use of (*r*); but an erasure *over* the jurat does not vitiate it (*s*). If the date in Corresponding with declaration, summons and capias. Jurat.

(*m*) *Jones* v. *Collins*, 6 Dowl. 526; *Caunce* v. *Rigby*, 3 M. & W. 67; *Bank of England* v. *Reid*, 7 M. & W. 161.

(*n*) *Caunce* v. *Rigby*, *suprà*.

(*o*) *Dean and Chapter of Exeter* v. *Seagill*, 6 T. R. 688; *Crooke* v. *Davis*, 5 Burr. 2690; *Gilby* v. *Lockyer*, 1 Doug. 217; *Holland* v. *Johnson*, 4 T. R. 697.

(*p*) See *Green* v. *Elgie*, 1 Dowl. 344.

(*q*) *Ward* v. *Tummon*, 4 N. & M. 876.

(*r*) R. M. 37 Geo. III.

(*s*) *Atkinson* v. *Thompson*, 2 Chit. R. 19.

the jurat be struck out with a pen, and the right date be introduced, the affidavit becomes a nullity (*t*).

Jurat.

An affidavit entitled in the proper Court, and purporting to be sworn before "A. B., a commissioner, &c.," is sufficient; the jurat need not state that he is a commissioner for taking affidavits in that Court (*u*). Where an order for arrest was obtained on an affidavit signed by deponent, but the jurat was not signed by the Judge before whom it was sworn until after the order was made and acted upon, the Court set aside the proceedings for irregularity (*x*).

Variance from capias, how remedied.

Where the affidavit described plaintiff as J. R., public officer of the Western Banking Company for *Devon and Cornwall*, but omitted "for Devon and Cornwall" in the *capias*, the Court discharged without costs a rule *nisi* for defendant's discharge on plaintiff's filing an affidavit corresponding with the *capias* (*y*).

When to apply.

A variance between affidavit and the cause of action in the writ of summons cannot be taken advantage of before the declaration is delivered or filed (*z*), unless it plainly appear from the affi-

(*t*) *Chambers* v. *Barnard*, 9 Dowl. 557; and see 1 A. & E. 376, and 6 Bing. 236.

(*u*) *Burdekin* v. *Potter*, 9 M. & W. 13.

(*x*) *Bill* v. *Bament*, 9 Dowl. 810.

(*y*) *Richards* v. *Dispraile*, 1 Dowl. 384, N. S.

(*z*) *Naylor* v. *Eagar*, 2 Y. & J. 90.

davit that the form of action stated in the writ must be wrong (*a*). Application should be within a reasonable time for any defect in affidavit, which does not render it null (*b*).

If the affidavit to hold to bail be insufficient, apply to set aside the Judge's order for arrest, not the *capias* (*c*). An objection cannot be taken to the affidavit in the Exchequer, unless the affidavit be expressly referred to in the rule *nisi* (*d*). How to apply.

See "Arrest," *post*, p. 69. Waiver.

AFFIDAVITS GENERALLY.

An affidavit sworn before a party who has no authority to receive it, is a nullity (*e*). When null.

An objection that defendant's Christian name is omitted in the title of an affidavit, on which a rule *nisi* has been obtained, is not waived by appearing and producing affidavits in answer (*f*), or even by first entering into the merits of the case (*g*). The Courts will not amend the title Waiver.

(*a*) *Green* v. *Elgie*, 1 Dowl. 344 ; see *Richards* v. *Stuart*, 2 Id. 752.

(*b*) So held under 2 Will. IV. c. 39 ; see "Arrest."

(*c*) *Hopkinson* v. *Salembier*, 7 Dowl. 493.

(*d*) *Naylor* v. *Eager*, 2 C. & J. 99.

(*e*) Chit. Arch. Prac. p. 1219.

(*f*) *Clothier* v. *Ess*, 2 Dowl. 731 ; *Wood* v. *Critchfield*, 3 Tyr. 235 ; where the rules were discharged with costs.

(*g*) *Barham* v. *Lee*, 2 Dowl. 779, in which case affidavit was dated 1833 instead of 1834.

of such an affidavit (*h*); but it seems they will enlarge the rule until the title of the affidavit *on which cause is shown* can be amended (*i*).

ALLOCATUR.

Including costs which should have been in a separate allocatur.

Where the Master's *allocatur* was made without objection by the defendant, and it included both the costs of a cause and the costs of an award, and judgment was entered for the whole on the 4th of June, and the plaintiff died on the 18th of November, and a *scire facias* issued on the 12th of January following, to which defendant pleaded on the 19th; upon a motion being made on the 24th, to set aside the judgment on account of its falsity, by reason of its including the costs of the award, the Court held the objection to resolve itself into a mere irregularity in the *allocatur* (as separate *allocaturs* should have been made), and that it was answered, first by the consent of the defendant to the Master's taxation, and, secondly, by the waiver arising from lapse of time (*k*).

APPEARANCE.

Where judgment signed and no appearance.

If judgment for want of a plea be signed without any appearance or one that is null

(*h*) *Phillips* v. *Hutchinson*, 3 Dowl. 20.

(*i*) *Anderson* v. *Ell*, 3 Dowl. 73. Many of the rules in "Affidavit to hold to Bail" apply to affidavits generally.

(*k*) *Bignall* v. *Gale*, 1 Dowl. 497, N. S.

being entered, the judgment is a nullity (*l*), there being no person before the court against whom judgment can be given.

When it may be entered.

Defendant may appear after the expiration of the writ of summons (*m*). Appearance is irregular, if entered by plaintiff after he is out of Court, (as after a year from service of the writ,) or after he has signed judgment, one not having been entered before (*n*), or after an appearance has been entered by defendant (*o*).

How entered.

If there be a material variance in the names or number of the parties, it may be treated as no appearance (*p*); so unless it follow the form prescribed by the stat. 2 Will. IV. c. 39. Thus, where the appearance entered by defendant was worded, "In the Queen's Bench, T. W., plaintiff; G. L., defendant, attorney for , appears for h ," plaintiff was holden regular in treating it as null, and entering an appearance for defendant under the statute (*q*). If plaintiff, in appearing for the defendant, omit the words "according to the

(*l*) *Roberts* v. *Spurr*, 3 Dowl. 551; and see *Watson* v. *Dow*, 5 Id. 584. The case of *Williams* v. *Strahan*, 1 N. R. 309, to the contrary, seems to be no longer law.

(*m*) *Richardson* v. *Daley*, 7 Dowl. 25.

(*n*) *Watson* v. *Dow*, 5 Dowl. 584; *Smith* v. *Painter*, 2 T. R. 719.

(*o*) *Alsager* v. *Crisp*, 9 Dowl. 353.

(*p*) Chit. Arch. Prac. 122.

(*q*) *Warren* v. *Love*, 3 Jurist, 363; 7 Dowl. 602, *S. C.*

statute," it is an irregularity (*r*); and if he enter an ordinary appearance, *sec. stat.*, where the defendant is an infant, the proceedings will be set aside even after judgment by default (*s*), and if entered by infant in person or by attorney, it may be struck out on motion or summons with costs (*t*). Where the summons names defendant incorrectly, and he wishes to appear by his right name, he should appear as "A. B. sued by the name of C. D.," so as to correspond with writ, or he will be irregular (*u*). Where the party who entered the appearance himself discovers the irregularity, he should apply to amend it, and not to enter a new one (*x*); it may be amended also when entered by plaintiff, and this has been allowed even after declaration has been delivered (*y*). When an irregular appearance is entered by plaintiff, the defendant should apply to set it aside, promptly after service of notice of declaration, for he must then know that appearance has been entered (*z*). He certainly should apply within the time limited

Mode of application. Amendment.

When to apply.

(*r*) *Codrington* v. *Curlewis*, 9 Dowl. 968.

(*s*) *Nunn* v. *Curtis*, 4 Dowl. 729.

(*t*) *Paget* v. *Thompson*, 3 Bing. 609; *Hindmarsh* v. *Chandler*, 7 Taunt. 488.

(*u*) Lush's Prac. p. 332. See "Declaration."

(*x*) *Bate* v. *Bolton*, 4 Dowl. 677.

(*y*) *Wheston* v. *Packman*, 3 Wils. 49.

(*z*) *Strange* v. *Freeman*, 5 Dowl. 407.

for pleading, and he can never take advantage of it after judgment by default has been signed (*a*). Where defendant had entered an appearance by attorney, and plaintiff afterwards by mistake entered one for him, filed declaration, and served notice personally on defendant in the country, on the 17th of December, motion to set the appearance aside on the 11th of January was decided to be too late (*b*).

An irregularity in appearance entered by defendant, is waived by plaintiff's declaring, or if entered by plaintiff, it will be waived by taking declaration out of the office. After having entered an appearance, defendant cannot object to the process or service thereof (*c*). Waiver.

ARBITRATION.—See AWARD.

ARREST.

An arrest on mesne process, by a wrong name, is illegal (*d*), unless defendant be as commonly known by one name as by the other (*e*), or it be By wrong name.

(*a*) *Williams* v. *Strahan*, 1 N. R. 309; *Rutty* v. *Arbur*, 2 Dowl. 36: and see *Pell* v. *Brown*, 1 B. & P. 369.

(*b*) *Alsager* v. *Crisp*, 9 Dowl. 353.

(*c*) *Anon.*, 1 Chit. R. 129, a.

(*d*) *Capias* against Cocker does not authorize arrest of Cocken; *Finch* v. *Cocken*, 3 Dowl. 678; 2 C. M. & R. 203, *S. C.* See *Cole* v. *Hindson*, 6 T. R. 234; *Shadgett* v. *Clipson*, 8 East, 328.

(*e*) *Id.*

idem sonans (*f*), or defendant waive it as against himself, by executing bail-bond or putting in bail above by the name in the *capias* (*g*). There is a distinction on this point between arrest on mesne process and taking in execution on a judgment; for in the latter case the judgment operates as an estoppel (*h*).

Privilege. If a privileged person be arrested, it is only ground for discharge on motion; and trespass, it seems, is not maintainable against sheriff, though if he knew of the privilege, and maliciously arrested defendant, perhaps an action on the case would lie (*i*), in which form of action the question of malice would be discussed. A barrister may be taken in execution while attending in the ordinary way at quarter sessions, though he has been actually engaged in a case at the

(*f*) *Benedetto for Beniditto, Athibol* v. *Beniditto*, 2 Taunt. 401; *Kay for Key, Dickenson* v. *Bowes*, 16 East, 110. But Shakepear not *idem sonans* with Shakespeare, *R.* v. *Shakespeare*, 10 East, 83; and see 11 Moore, 231; *Hoye* v. *Bush*, 2 Scott, N. R. 86.

(*g*) *Meredith* v. *Hodges*, 2 N. R. 453; *Stroud* v. *Gerrard*, 1 Salk. 8.

(*h*) *Reeve* v. *Slater*, 7 B. & C. 486, and *per* Abinger, C. B., 2 C. M. & R. 204; *Crawford* v. *Satchwell*, 2 Stra. 1218.

(*i*) See *Watson* v. *Carrol*, 7 Dowl. 217; *Newton* v. *Constable*, 9 Dowl. 933; 1 G. & D. 408, *S. C.*; *Tarlton* v. *Fisher*, Dougl. 671; *Noel* v. *Isaac*, 1 C. M. & R. 753, and 10 Rep. 76, b; 6 Rep. 52, a; 2 W. Bla. R. 1190; 7 C. & P. 506.

sessions (*k*). Many persons privileged from arrest before 1 & 2 Vict. c. 110, may not now be exempt, especially where a perpetual absence from this country is contemplated. It has been decided that an attorney about to quit the kingdom may now be arrested (*l*), the reason of his privilege being his supposed constant attendance upon the Courts, and it failing under these circumstances.

By whom made.

If the warrant be directed to several jointly, and not severally, the arrest must be made by all, or it is illegal; that is, all must take part in the arrest (*m*). The defendant, however, will not be discharged, but left to his remedy (if any) against the party arresting (*n*).

When made.

The arrest must not be made after one calendar month from the date of the writ, including such date (*o*); and if made on a Sunday, it will be void, and no subsequent consent can cure it (*p*). Where defendant came to plaintiff's house on a Sunday, and was detained until the next morning and then arrested, the arrest was holden void (*q*).

(*k*) *Newton* v. *Constable*, 9 Dowl. 933.

(*l*) *Thomson* v. *Moore*, 1 Dowl. 283, N. S.

(*m*) *Boyd* v. *Durand*, 2 Taunt. 161; *Blatch* v. *Archer*, Cowp. 65.

(*n*) *Id.*

(*o*) 1 & 2 Vict. c. 110, s. 4.

(*p*) 29 Car. II. c. 7, s. 6; *Lyford* v. *Tyrrel*, 1 Ans. 85; *Taylor* v. *Phillips*, 3 East, 155.

(*q*) *Lyford* v. *Tyrrel*, *supra*.

Where made. Arrest in a wrong county is unlawful, and defendant will be discharged and bail-bond cancelled, if there be no dispute as to the boundaries (*r*).

How made. It is unlawful, if, in order to make it, officer break open outer door or window (*s*); and so, if defendant be deprived of his liberty by any illegal contrivance, either on the part of plaintiff, or on that of the sheriff and his officer.

To render an arrest legal, the officer must, as directed by the writ, "on the execution thereof deliver a copy thereof" to the defendant; a delay in such delivery of ten hours after arrest is not a compliance with this direction (*t*); and if the copy vary, so that the sense is altered, or that the defendant may be misled, it is a ground for discharge (*u*).

What is holding to bail. It seems that taking a bail-bond is a sufficient holding to bail under 43 Geo. III. c. 46, s. 3; but it is doubtful if it is sufficient where the *capias* served is afterwards set aside for irregularity (*x*).

If the first arrest be made on void process,

(*r*) *Hammond* v. *Taylor*, 3 B. & Ald. 408.

(*s*) *Lee* v. *Gansell*, Cowp. 1; *Lemayne's* case, 5 Rep. 91.

(*t*) Under 2 Will. IV. c. 39; *Shearman* v. *M'Knight*, 5 Dowl. 572.

(*u*) *Sutton* v. *Burgess*, 3 Dowl. 489; *Nicol* v. *Boyne*, 2 Dowl. 761; *Smith* v. *Pennell*, 2 Dowl. 654; *Street* v. *Carter*, Id. 671; *Forbes* v. *Mason*, 3 Dowl. 104.

(*x*) *Reynolds* v. *Matthews*, 7 Dowl. 580.

or be otherwise illegal, defendant cannot be detained by virtue of subsequent process, however regular, unless at the suit of another plaintiff (*y*), and not even then if the first arrest were illegal by the wrongful act of the sheriff himself (*z*). Detainer.

Affidavits in support of an application to discharge defendant on the ground of irregularity, must show that he has been actually arrested on the process (*a*). Application. How to apply.

If the application for discharge be founded on the insufficiency of the affidavit to hold to bail, apply to set aside the Judge's order, not the *capias* (*b*). To take advantage of an arrest made in a wrong county, the affidavits must show that the arrest did not take place on the borders of the county, and that there is no dispute as to the boundaries (*c*). Where a party in a cause was arrested pending the trial, he was discharged on an affidavit of the facts entitled in the cause to which he was such party (*d*). It seems, if defendant give a satisfactory explanation of the facts

(*y*) *Barclay* v. *Faber*, 2 B. & Ald. 743.

(*z*) *Barratt* v. *Price*, 1 Dowl. 725; *Robinson* v. *Yewens*, 5 M. & W. 149; *Pearson* v. *Yewens*, 7 Dowl. 451. See *post*, "Ca. Sa."

(*a*) *Green* v. *Rohan*, 4 Dowl. 659.

(*b*) *Hopkinson* v. *Salembier*, 7 Dowl. 493.

(*c*) *Webber* v. *Manning*, 1 Dowl. 24; *Lloyd* v. *Smith*, Id. 372; *Storer* v. *Rayson*, 4 D. & R. 739.

(*d*) *Newton* v. *Harland*, 3 Jurist, 679.

which led to his arrest, the plaintiff, in answer to his application for a discharge, should disprove such explanation (*e*).

When to apply.

Defendant, by the express language of 1 & 2 Vict. c. 110, s. 6, may apply for his discharge "at any time *after* his arrest;" he cannot apply on account of an irregularity in bailable process, before it has been executed, nor even procure a copy of the affidavit (*f*). An application to set aside a Judge's order for arrest, should be made within the time limited for putting in bail, (eight days,) but a longer period is allowed, if it be founded on a material defect, or on the falsity of the affidavit (*g*). Thus, if the copy mistake the duration of the writ (*h*), or the Sovereign's name in whose reign it was issued (*i*), or be defective in the indorsement (*k*), eight days from the means of knowledge is the period allowed, but where the order was made on a false affidavit, twelve days were

(*e*) *Walker* v. *Lumb*, 9 Dowl. 131.

(*f*) See Lush's Prac. p. 606.

(*g*) *Walker* v. *Lumb*, 9 Dowl. 131; *Newton* v. *Harland*, 3 Jurist, 679; *Greenshield* v. *Pritchard*, 1 Dowl. 51, N. S.; *Shugars* v. *Concanen*, 7 Dowl. 391; *Tarber* v. *French*, 4 A. & E. 362; *Smith* v. *Pennell*, 2 Dowl. 654; *Jervis* v. *Jones*, 4 Id. 610; *Sharpe* v. *Johnson*, Id. 324; *Fowell* v. *Petre*, 5 A. & E. 818.

(*h*) *Shugars* v. *Concanen*, 7 Dowl. 391.

(*i*) *Brashour* v. *Russell*, 4 Bing. N. C. 31.

(*k*) *Foote* v. *Dick*, 1 Har. & Wol. 207.

holden not too late (*l*); and where the affidavit was void, as not being sworn before a proper commissioner, the lapse of two months was no bar (*m*); after a year had elapsed, however, the court refused to interfere, where defendant had been arrested in a wrong county, though he swore that he was not aware of the fact until ten months after his arrest, and he then immediately applied, without success, for his discharge, to a Judge at chambers (*n*).

Under 2 Will. IV. c. 39,—and the same practice, it seems, will prevail,—it was holden too late to object to the affidavit to hold to bail, after defendant had put in bail (*o*), or had deposited the sum sworn to and 20*l*., in lieu of bail above (*p*), or had obtained time to put in bail above (*q*), and the like. Waiver.

But as on an affidavit that the maker and indorser of a promissory note are indebted to the holder, neither can be holden to bail; if one should be arrested, he does not waive this defect,

(*l*) *Walker* v. *Lumb*, 9 Dowl. 131.

(*m*) *Sharpe* v. *Johnson*, 4 Dowl. 324.

(*n*) *Greenshield* v. *Pritchard*, 1 Dowl. 51, N. S.; and *per Cur.*—"We do not feel ourselves warranted in interfering after the lapse of such an interval of time."

(*o*) *Reeves* v. *Hucker*, 2 C. & J. 44; *Morgan* v. *Bayliss*, 3 Dowl. 117.

(*p*) *Green* v. *Glassbrook*, 1 Bing. N. C. 516.

(*q*) *Urquhart* v. *Dick*, 9 Legal Observer, 221; and see 3 Chit. Gen. Prac. 516.

which seems to render the affidavit a nullity, by taking any step in the cause (*r*).

The objection that the arrest was by a wrong name, is waived by executing the bail-bond or putting in bail above by the name used in the *capias* (*s*), or by obtaining a Judge's order or summons by that name (*t*).

ATTACHMENT.

Irregularity in form.

If the copy of the rule served, whereon the attachment is granted, vary from the original, the prisoner will be discharged. Thus, where in the copy of the rule and *allocatur*, the defendant's name was written "Calver," instead of "Calvert," and the master's name "Day," instead of "Dax," a rule for discharging the prisoner was made absolute with costs (*u*). A misnomer in the Christian name of the defendant has the same effect, and this, even after the mistake has been amended by a Judge's order (*x*); but he might be retaken, it seems, though not detained

(*r*) *Hussey* v. *Wilson*, 5 T. R. 254.

(*s*) *Ante*, p. 64. See *Meredith* v. *Hodges*, 2 N. R. 453; *Stroud* v. *Lady Gerrard*, 1 Salk. 8.

(*t*) *Nathan* v. *Cohen*, 3 Dowl. 370; and see 1 B. & P. 529; 2 B. & P. 466. See 3 Bing. 296; 6 Moore, 264.

(*u*) *Smith* v. *Calvert*, 2 Dowl. 276.

(*x*) *Reg.* v. *Burgess*, B. C. H. 1838, Coleridge and Patteson, JJ., 2 Jurist, 856.

on such amended writ (*y*). The service of a rule, whereon to ground an attachment, should be personal, but under very special circumstances this will be dispensed with (*z*). Prisoner must apply promptly;—a delay from the 3rd of February to the 28th of April is unreasonable (*a*). Service. Application for discharge. When.

In applying to set aside an attachment, the affidavit should be entitled "*The Queen* v. ———" (the party attached) (*b*); in the case of an attachment against the sheriff, it is usual to add the name of the cause, thus, "*The Queen* v. *the Sheriff of Middlesex*, in a cause of *J. N.* v. *J. S.*," though the cause need not, it seems, be added (*c*). Under the old practice, plaintiff could not take a step in the cause, without admitting defendant to be in Court; but since 1 & 2 Vict. c. 110, which enables plaintiff to hold defendant to bail at any time during the progress of the suit, plaintiff, by declaring in chief, does not waive his right to attach the sheriff for not bringing in the body (*d*). If any of the How. Waiver of right to attach sheriff.

(*y*) See *Reg.* v. *Burgess*, 3 N. & P. 366.

(*z*) See Chit. Arch. Prac. p. 12, 64 (*g*); and add *Doe d. Steer* v. *Bradley*, 1 Dowl. 259, N. S.; *Ex parte Burgin*, Id. 295; *Jordan* v. *Berwick*, Id. 271.

(*a*) *Reg.* v. *Burgess*, 2 N. & P. 366.

(*b*) *Rex* v. *Sheriff of Middlesex*, 7 T. R. 439.

(*c*) *Rex* v. *Sheriff of Middlesex*, 5 B. & C. 389.

(*d*) *The Queen* v. *Sheriff of Montgomeryshire*, 1 Dowl. 388, N. S.; *Howitt* v. *Rickby*, Id. 389; 9 M. & W. 52, *S. C.*

previous proceedings of plaintiff against bail have been irregular, the sheriff is not liable to an attachment, on their not being perfected (*d*).

ATTORNEY.

Uncertificated or off the roll taking step.

The interests of the client are not to suffer for the misconduct of the attorney, and a party is not bound to ascertain whether the attorney he is about to employ be duly qualified; therefore a step taken by the attorney while uncertificated or off the roll, is not void, nor even irregular, on that account. Thus, the courts have refused to set aside a judgment obtained by him (*e*), to quash a *habeas corpus* sued out by him (*f*), to cancel a bail-bond because he had sued out the *capias* (*g*), or to discharge a rule served by him for setting aside proceedings (*h*).

Where, however, it is expressly required for *the benefit of the client himself* and for his protection from fraud and oppression that the attorney should be duly qualified, a different rule prevails. Hence, a warrant of attorney executed in the presence of, and attested by, an attorney who has not taken out his certifi-

(*d*) *Cohn* v. *Davis*, 1 H. Bla. 89; and see *Hodson* v. *Garrett*, 1 Chit. R. 174.

(*e*) *Smith* v. *Wilson*, 1 Dowl. 545; *Anon.* v. *Sexton*, Id. 180; *Hilleary* v. *Hungate*, 3 Dowl. 56.

(*f*) *Glynn* v. *Hutchinson*, 3 Dowl. 529.

(*g*) *Welch* v. *Pribble*, 1 D. & R. 215.

(*h*) *Harding* v. *Purkiss*, 2 Marsh, 228.

cate within a year, is void (*i*). In other cases, the proper course is to apply for a stay of proceedings, until a proper attorney be appointed (*k*).

There can be but one attorney at a time on the record; and while his authority continues, any step in the cause taken by another attorney, unless the former has been changed by leave of the Court, or a Judge, is irregular. The authority of an attorney to sue and defend certainly continues until final judgment; and he may afterwards sue out execution within the year, and receive the money due on the judgment, and if he receive it, enter satisfaction on the record (*l*). It would appear from the majority of the decisions, and upon principle, that a step by a new attorney should not be taken without an order for change, until the record is so completed by entering satisfaction (*m*); Change of attorney.

(*i*) *Verge* v. *Dodd*, Tidd's Prac. Supp. 57; and see *Wallace* v. *Brockley*, 5 Dowl. 699; 1 & 2 Vict. c. 110, s. 9, expressly declares, that unless executed and attested in the presence of an *attorney*, it shall be void.

(*k*) *Bayley* v. *Thompson*, 2 Dowl. 655; see *Hill* v. *Mills*, Id. 696.

(*l*) *Savoury* v. *Chapman*, 8 Dowl. 663; 2 Inst. 378; 1 Roll. Ab. 291; *Anon.*, 12 Mod. 440; *Lawrence* v. *Harrison*, Sty. 426; *Marr* v. *Smith*, 4 B. & Ald. 466; *Davis* v. *Jones*, 5 Dowl. 504; *Crozer* v. *Pilling*, 4 B. & C. 26; Com. Dig. "Attorney," B. 10; see also *Phillips* v. *Berkley*, 5 Dowl. 279.

(*m*) See this position ably maintained by Mr. Lush, Prac. p. 221.

though in one case, the Court of Common Pleas held, that execution might be sued out by a new attorney, without an order for change (*n*).

A *scire facias* and a writ of error may be sued out by a new attorney, without leave for the change, because these are considered new proceedings (*o*). So an order for change need not be served in order to entitle a party, who has changed his attorney, to show cause to a rule *nisi*, for the party called upon may oppose it in person, and the reason, viz., that the adverse party may know whom to look to, does not apply (*p*); neither does it appear necessary where the suit was commenced by a firm, and a dissolution taking place, one member continues the action (*q*); and only a notice to the opposite party is required where the attorney dies (*r*).

A step taken by an attorney improperly changed without leave, or where the order has not been served on the opposite party is, however, only irregular, and can in no case be treated as a nullity (*s*); consequently it may

(*n*) *Tipping* v. *Johnson*, 2 B. & P. 357.

(*o*) *Burr* v. *Atwood*, 1 Salk. 89; *Batchelor* v. *Ellis*, 7 T. R. 337.

(*p*) *Lovegrove* v. *Dymond*, 4 Taunt. 669.

(*q*) *Farley* v. *Hebbes*, 3 Dowl. 538.

(*r*) *Ryland* v. *Noakes*, 1 Taunt. 342.

(*s*) *Doe d. Bloomer* v. *Bransom*, 6 Dowl. 490; and see *May* v. *Pike*, Id. 667, where, however, the only point insisted upon was, that *no leave*, under the circumstances, was necessary.

be waived; and taking the declaration pleaded by the new attorney out of the office (*t*), or attending summons taken out by him, and making no objection (*u*), amounts to a waiver. Waiver.

If an attorney commence a suit without authority, defendant may stay or set aside proceedings at the cost of the attorney; but as between the parties themselves, neither can move to set them aside; but he whose name has been improperly used is liable as the party on the record, and must seek his remedy against the attorney, provided the latter be solvent; otherwise, at the instance of the party, the Court will set aside the proceedings (*x*). Acting without authority.

An attorney, who is about to quit the country, may now be arrested (*y*). Arresting attorney.

AWARD.

If the arbitrator make his award after the Nullity.

(*t*) *Margerem* v. *Makilwaine*, 3 N. R. 509.

(*u*) *Farley* v. *Hebbes*, 3 Dowl. 538. It is sufficient, if the attorney has acted as such (*e. g.* accepting declaration, and obtaining time to plead), without his name being on the record, to render leave for change necessary. *May* v. *Pike*, *supra*. Change of attorney is not a step in the cause; *Deacon* v. *Fuller*, 1 Dowl. 675; and, therefore, of itself will not operate as a waiver of an irregularity.

(*x*) See 1 Salk. 88; *King* v. *Davies*, 12 Mod. 579; *Stanhope* v. *Firmin*, 3 Bing. N. C. 301; *Mudry* v. *Newman*, 1 C. M. & R. 402.

(*y*) *Thompson* v. *Moore*, 1 Dowl. 283, N. S.

time limited by the rule, order, or submission, or the enlarged time (where it has been enlarged), or after any time when his authority is determined, it is void (*z*).

Setting aside.

The Courts will not set aside an award absolutely void, but will leave the applicant to his defence in an action upon it; but it is otherwise if it be capable of being enforced without suit (*a*). If there has been any irregularity in the mode of proceeding, as if no notice of the meeting were given to the party against whom the award was made, it will be set aside (*b*).

Application.

If the ground of application be that the order of reference was improperly obtained, the Court will not set aside the award, for the application should be to set aside the order itself (*c*).

The rule must be drawn up "on reading the award," or "a copy of the award" (*d*); and where it was drawn up on reading the affidavit,

(*z*) See *M'Arthur* v. *Campbell*, 2 N. & M. 446, n.; Chit. Arch. Prac. pp. 1239, 1240. If all matters in difference *in the cause* be referred, and the associate by mistake draws up the order of reference generally, as to all matters between the parties, it is a nullity. *Rawtree* v. *King*, 5 Moore, 167.

(*a*) *Hobbs* v. *Ferrars*, 8 Dowl. 779; *Doe d. Turnbull* v. *Brown*, 5 B. & C. 384; and see *King* v. *Joseph*, 5 Taunt. 452. Neither will they set it aside if there be a doubt as to its validity. *Richardson* v. *Nourse*, 3 B. & Ald. 237; *Burley* v. *Stevens*, 4 Dowl. 770.

(*b*) Salk. 71.

(*c*) *Sackett* v. *Owen*, 2 Chit. R. 39.

(*d*) *Sherry* v. *Oke*, 3 Dowl. 349.

and "the paper writing annexed," being a copy, but not so called, it was discharged (*e*); but not so, where the affidavits stated facts, which showed that it was a copy (*f*). And in the Common Pleas, on moving to set aside an award made under a rule of Court, the rule *nisi* should be drawn up on reading also the rule under which the matter was referred (*g*). Also by a rule in the Queen's Bench and Common Pleas, which is adopted in the Exchequer, the several objections for which the rule is to be made absolute must be stated in the rule *nisi*. Where, however, they were specified in the affidavits on which the rule was founded, the Court of Queen's Bench held it equivalent to their being stated in the rule (*h*). In one case, the Court of Queen's Bench allowed a fresh affidavit to be filed in support of a rule to set aside an award after the rule *nisi* had been obtained (*i*). A motion to set aside an award cannot be made on the last day of term (*j*), nor can cause be shown against a rule *nisi* for this purpose on such last day (*k*).

(*e*) *Sherry* v. *Oke*, 3 Dowl. 349.

(*f*) *Hayward* v. *Phillips*, 6 A. & E. 119; see also *Barton* v. *Ransom*, 5 Dowl. 597.

(*g*) *Christie* v. *Hamlet*, 4 Bing. 195.

(*h*) *Rawsthorn* v. *Arnold*, 6 B. & C. 629.

(*i*) *Perryn* v. *Kymer*, 4 N. & M. 477.

(*j*) See Tidd, (9th ed.) p. 498; Cowper, 23.

(*k*) R. M. 36 Geo. III. R. 4.

Time of application.

Any arbitration or umpirage obtained by corruption or undue means is declared void by 9 & 10 Will. III. c. 15, s. 2, and may be set aside before the last day of the next term after the making and publishing of such arbitration, &c. Where the reference is by rule of *Nisi Prius* of the cause only, the application to set aside the award is treated as an application for a new trial, and must consequently be made within the first four days of the term next ensuing the publication of the award (*l*). Where the cause is referred by a Judge's order, the time of application is governed by analogy to the above statute, and should in general be within the term ensuing the making of the award (*m*). The time begins to run in the Queen's Bench when the party has notice that the award is ready on payment of charges whether reasonable or not, but in Common Pleas and Exchequer, when such notice states it to be ready on payment of *reasonable* charges (*n*); and "publication" means such notice of the award as will enable the parties to obtain knowledge of its contents (*o*).

Waiver.

An objection to the award on account of the

(*l*) *Allenby* v. *Proudlock*, 4 Dowl. 54.

(*m*) *Hobbs* v. *Ferrars*, 8 Dowl. 779; *Brooke* v. *Mitchell*, Id. 392.

(*n*) *M'Arthur* v. *Campbell*, 2 N. & M. 444; *Musselbrook* v. *Dunkin*, 9 Bing. 605; *Brooke* v. *Mitchell*, 8 Dowl. 392.

(*o*) *Brooke* v. *Mitchell*.

time for making it not having been duly enlarged, or to an umpirage on account of umpire not having been duly appointed, and the like, may be waived by the parties attending the arbitrator or umpire, and proceeding in the reference, &c. with a knowledge of the fact (*o*). So if a party accept any benefit under an award, —as costs directed by it to be paid to him— he cannot afterwards impeach its validity (*p*).

BAIL-BOND AND BAIL.

Proceedings against bail, if irregular, may be set aside, and the causes of irregularity are as numerous as the different proceedings out of which they arise; so, in many cases where proceedings against principal are irregular, bail will be discharged. Where the defect is in the bail-bond itself, and matter of defence, the Court will generally leave the bail to plead it (*q*).

The security of bail must be by *bond* (*r*) to Form of bond.

(*o*) *Benwell* v. *Hinxman*, 3 Dowl. 500; *Lawrence* v. *Hodgson*, 1 Y. & J. 16; *Hallett* v. *Hallett*, 7 Dowl. 389; *Kingwell* v. *Elliot*, Id. 423; and see *Bignall* v. *Gale*, 9 Dowl. 631.

(*q*) *Kennard* v. *Harris*, 2 B. & C. 801.

(*q*) See *Salter* v. *Shergold*, 3 T. R. 572; *Cholmley* v. *Veal*, 6 Mod. 304.

(*r*) *Beawfage's* case, 10 Rep. 42 b.; *Lewis* v. *Knight*, 8 Bing. 271. In the latter case the Court held, that an undertaking for a bail-bond, given to the sheriff by the defendant's attorney, was a mere nullity, and therefore discharged (with costs) an application by defendant, though she was a *feme covert*, to set it aside.

the sheriff himself (*s*), by the name of his office (*t*), and upon condition written, that defendant shall appear at the day contained in the writ or warrant, and in such place as the writ or warrant shall require; otherwise it shall be void; 23 Hen. VI. c. 9, ss. 7, 8.

If the bond be single, and without any condition (*u*), or, which is the same thing, if the condition be impossible (*x*), or for anything but the appearance of defendant, or if there be a material variance between the bond and the writ (*y*), it will be void; but it will not be avoided by a mere informality or an immaterial variance (*z*).

Name of defendant.

Where the bond, in reciting delivery of the writ, stated, that "a copy of the writ was duly delivered to ," omitting the name of defendant, and likewise omitting it in the statement of the condition, it was holden a nullity (*a*).

(*s*) *Rogers* v. *Reeves*, 1 T. R. 418; *Fuller* v. *Prest*, 7 Id. 109; *Sedgworth* v. *Spicer*, 4 East, 568.

(*t*) 1 T. R. 422; and see *Courtney* v. *Phelps*, 1 Sid. 300; *Eymes* v. *Oakes*, 2 Stra. 893.

(*u*) 37 Hen. VI. 1 a, pl. 7.

(*x*) *Posterne* v. *Hanson*, 2 Saund. 60.

(*y*) See *Bennet* v. *Filkins*, 1 Wms. Saund. 20; 2 T. R. 569.

(*z*) See 2 Wms. Saund. 60 a.

(*a*) *Holding* v. *Raphael*, 5 M. & W. 655; and see *Parker* v. *Bent*, 2 D. & R. 73, where the bond was cancelled, because executed by initials of defendant's Christian name.

So if the arrest were by a wrong name, unless defendant were known by one name as well as the other (*b*).

For what sum.

It is the practice to take bail for double the amount indorsed on the writ, and a mistake in the sum has been holden not to avoid the bond (*c*); but now, if taken for *more* than double the amount, the Courts will order it to be delivered up to be cancelled (*d*).

When executed.

The bond is void, if taken after the eight days limited for putting in bail (*e*), or if executed before the condition is filled up (*f*).

Action upon bond.

If an action upon the bail-bond cannot, from circumstances, be brought against all the bail jointly, and each of the parties be resident within the jurisdiction of the Court, it must be brought against them severally; but if against two instead of three jointly, it is not ground for a motion to the Court, but only for a plea in abatement (*g*). If such action be commenced,

(*b*) *Finch* v. *Cocken*, 3 Dowl. 678; see "Arrest."

(*c*) *Whiskard* v. *Wilder*, 1 Burr. 331; *Norden* v. *Horsley*, 2 Wils. 69; *Turner* v. *Bayley*, Cas. Prac. C. P. 43; the stat. 12 Geo. I. c. 29, s. 2, being regarded as merely directory.

(*d*) *Cook* v. *Cooper*, 7 A. & E. 605; and in *Wingrave* v. *Godmond*, 6 C. & P. 66, Tindal, C. J., reprobated the taking it in more than double the sum.

(*e*) *Pullein* v. *Benson*, 1 Ld. Raym. 352; *Thompson* v. *Rock*, 4 M. & S. 338; *Samuel* v. *Evans*, 2 T. R. 569.

(*f*) *Powell* v. *Duff*, 3 Camp. 181.

(*g*) *Knowles* v. *Johnson*, 2 Dowl. 653.

or an assignment of the bail-bond taken, pending a rule which stays the proceedings in the original action, the Court will set aside the proceedings in the action on the bond, or set aside the assignment (*h*). So where it is commenced too soon or too late; and it is irregular to serve bail with a writ in the action after notice of render, though it was sued out previously to the notice (*i*).

Bail above. Disqualified bail being put in.

By Reg. H. 2 Will. IV. R. 13, if any practising attorney, or his clerk, be put in as bail to the action, except for the purpose of rendering only, plaintiff may treat bail as a nullity, and sue on the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time. The other disqualifications, such as being sheriff's officer, bailiff, &c., do not entitle plaintiff to treat bail as a nullity (*k*); but he must except to them, and proceed as if regular bail had been put in.

Bail-piece.

If the bail-piece does not correspond with the proceedings, or if it be entitled in a cause of *A.* v. *C.*, instead of *A. and B.* v. *C.*, or in a wrong Court (*l*), or if county in margin be different

(*h*) *Swayne* v. *Crammond*, 4 T. R. 176.

(*i*) *Lewis* v. *Grimstone*, 5 Dowl. 711.

(*k*) *Banter* v. *Levi*, 1 Chit. R. 713; *Hawkins* v. *Magnall*, Doug. 466.

(*l*) *Anon.*, 2 Chit. R. 77; *Fenton* v. *Ruggles*, 1 B. & P. 356; *Holt* v. *Frank*, 1 M. & S. 199.

from that into which the writ issued (*m*); in these cases, as the bail might plead *nul tiel record* to a *sci. fa.*, plaintiff may treat it as a nullity. But where the defendant is misnamed, an amendment will generally be allowed, certainly if with the consent of the bail (*n*). If one or both of the bail, who come up to justify, be rejected for insufficiency, the bail-piece becomes a nullity for this purpose, and notice then should not be of adding new bail upon it, but of putting in and justifying bail (*o*). Where in an action against two, the recognizance of bail was drawn up in an action against one only, and plaintiff, after two writs of *sci. fa.* and *nihil* returned to them, signed judgment, it was set aside as irregular (*p*).

Notice of bail.

The consequences of a defect in the notice of bail, where bail has been put in and affidavits delivered, will be to deprive defendant of the costs of justification, and plaintiff will, if necessary, have further time to inquire after the bail; but if it be a notice of putting in and justifying, it will perhaps cause the bail to be rejected altogether (*q*). The plaintiff, however,

(*m*) *Smith* v. *Miller*, 7 T. R. 96.

(*n*) See *Anderson* v. *Noah*, 1 B. & P. 31; *Croft* v. *Coggs*, 4 Moore, 65; and *Bingham* v. *Dickie*, 5 Taunt. 814.

(*o*) *Lewis* v. *Gadderer*, 5 B. & Ald. 704; *Vestris's Bail*, 5 Dowl. 622.

(*p*) *Holt* v. *Frank*, 1 M. & S. 199.

(*q*) See Lush's Prac. p. 627.

cannot, by reason of any informality, even where the names of the bail are omitted altogether (*r*), treat the notice as a nullity, and sue on the bail-bond, but he must except to the bail (*s*). "Notice of more than *two* shall be deemed irregular, unless by order of the Court, or a Judge."—H. T. 2 Will. IV. R. 18. So it is irregular if the residence of the bail be omitted (*t*).

Notice of exception.

If the notice, or entry of notice, of exception be omitted, it is no exception, even, it would seem, as against defendant (*u*).

The notice of exception must be given within twenty days from the service of notice of bail, or the exception will be void, and bail need not justify (*x*).

Notice of justification.

So the omission of the hour at which bail would justify, in the notice of justification, has been holden to render it a nullity, and to entitle plaintiff to proceed on the bail-bond, though a second notice was given on the same day, specifying the time and correcting the mistake (*y*);

(*r*) *Pugh* v. *Emery*, 4 D. & R. 30.

(*s*) *Wigley* v. *Edwards*, 2 C. & M. 320; *Bell* v. *Foster*, 1 Dowl. 271; *Martin* v. *Gell*, 2 Tyr. 166.

(*t*) See 3 Dowl. 116; 1 Bing. N. C. 258.

(*u*) *Oldham* v. *Burrell*, 7 T. R. 26; and see 4 D. & R. 365.

(*x*) See 7 T. R. 26.

(*y*) *Staines* v. *Stoneham*, 4 Dowl. 678.

but it seems plaintiff should not proceed on the bond before the time for justifying has expired (*z*). If bail justify, a rule of allowance must be immediately drawn up and served, otherwise defendant will be taken to have waived the justification, and the bail will not be perfected (*a*). Rule of allowance.

The bail can take advantage of such defects in a proceeding against the principal, as render it void, only by *pleading* them in their discharge (*b*); but of such as render it irregular merely, they will be relieved, if at all, only by motion. It is not necessary to put in bail to the action, before moving to set aside proceedings on the bail-bond for irregularity (*c*). Mode of taking advantage.

It is scarcely of use to except to the bail, on the ground of defects in the notice of bail or justification, or service of such notice or affidavit of sufficiency; for if plaintiff has found the bail, so as to be able to make inquiries as to their responsibility, the objection will frequently be overlooked, though defendant will not be allowed costs of justification (*d*).

Where the defendant was arrested in an action

(*z*) *Smith* v. *Webb*, 2 M. & W. 879.

(*a*) *Rex* v. *Sheriff of Middlesex*, 2 Dowl. 116.

(*b*) *Ante*, p. 32.

(*c*) *Heath* v. *Gurley*, 4 Moore, 149; *contra*, if they be regular, and it be sought to set them aside on terms.

(*d*) *De Bode's Bail*, 1 Dowl. 368; *Stevens* v. *Millar*, 2 M. & W. 368; *Fearnley's Bail*, 1 Dowl. 40.

of *assumpsit*, and plaintiff afterwards declared in covenant, the Court set aside the declaration, but refused to order the discharge of the bail (*e*).

Where an irregular judgment was signed against the principal, and after due proceedings, a *ca. sa.* issued against the bail, on motion by them and the principal, it was holden that the *judgment* and subsequent proceedings upon it might be set aside, and that their application should be accordingly; but not to set aside the *ca. sa.* alone, because, while the judgment stands against the principal, the proceedings founded on it must be taken to be regular (*f*). On a summons to set aside a bail-bond for irregularity, an objection to the indorsement on the *capias* cannot be raised (*g*).

Entitling the affidavits.

If no action be pending against the bail, the affidavit must be entitled in the original action (*h*). Where, however, an action has been commenced against them, there is said to be this distinction;—if the application be to set aside proceedings on the bail-bond, for an irregularity in *assigning* it, the rule or summons and affidavit should be entitled in the original cause; but if it has been assigned regularly,

(*e*) *Ward* v. *Tummon*, 4 N. & M. 876.
(*f*) *Hayward* v. *Ribbans*, 4 East, 310.
(*g*) *Yates* v. *Chapman*, 3 Bing. N. C. 262.
(*h*) *Roberts* v. *Gidding*, 1 B. & P. 337.

and irregularity be in the proceedings against the bail, then the title should be that of the action on the bail-bond (*i*). It has, however, been holden by the Court of Queen's Bench, that in the former case, or to stay proceedings on a bail-bond, they might be entitled in either action (*k*). In the Common Pleas, the judgment in the original action, as well as the judgment in the action against the bail, may be set aside on one motion, and on an affidavit entitled in the original cause (*l*); and where it was sought to set aside proceedings in both actions, for an irregularity in a *ca. sa.* against principal, the Court of Exchequer held that the affidavit might be entitled in both actions (*m*).

When to apply.

Where defendant, having had notice on the 16th of May, that an action was commenced on the bail-bond, applied to set aside the proceedings on the 26th, (the fourth day of term,) he was not too late (*n*); but where a *ca. sa.* against the principal was lodged at the sheriff's office on the 24th of October, and proceedings were com-

(*i*) Tidd's Prac. (9th edit.), 304.

(*k*) *Kelly* v. *Wrother*, 2 Chit. R. 109; and see *Leyles* v. *Chetwood*, 1 Dowl. 321; *Ham* v. *Philcox*, 7 Moore, 321; *Blackford* v. *Hawkins*, Id. 600; and so laid down in Chit. Arch. Prac. p. 570, if application be to set aside proceedings on the bail-bond.

(*l*) *Winder* v. *Wood*, 3 B. & P. 118; Tidd, 304.

(*m*) *Pocock* v. *Cockerton*, 7 Dowl. 21.

(*n*) *Smith* v. *Webb*, 2 M. & W. 879.

menced against bail on the 3rd of November, a motion to set aside the *ca. sa.* and subsequent proceedings for irregularity, was too late on the 13th of November (*o*).

Waiver.

Defendant cannot by any act of his own waive, as against them, an advantage to which the bail (*p*) or the sheriff (*q*) may be entitled. By taking an assignment of the bail-bond, plaintiff discharges sheriff, provided the bond be valid (*r*); but he may abandon proceedings against the sheriff, and proceed on the bail-bond (*s*). If any of plaintiff's proceedings against the bail have been irregular, the sheriff is not afterwards liable to an attachment on their not being perfected (*t*), though defendant as against himself has waived the irregularities. After assignment, plaintiff cannot demand a plea, or otherwise proceed in the original action, without waiving his right of action against the bail (*u*). When bail to the sheriff become bail to the action, plaintiff may except to them, though he has taken an

(*o*) *Pocock* v. *Cockerton*, 7 Dowl. 21.

(*p*) *Hammond* v. *Taylor*, 3 B. & Ald. 408.

(*q*) *Cohn* v. *Davie*, 1 H. Bla. 80; *ante*, p. 20.

(*r*) 2 Wms. Saund. 60 b.

(*s*) *Pope* v. *Wyatt*, 15 East, 215.

(*t*) *Cohn* v. *Davie*, 1 H. Bla. 80; and see *Hodson* v. *Garrett*, 1 Chit. R. 174; *Rogers* v. *Mapleback*, 1 H. Bla. 106; *Anon.*, 1 Chit. R. 374; and see Id. 741.

(*u*) See Chit. Arch. Prac. p. 560.

assignment of the bail-bond (*x*). Since 1 & 2 Vict. c. 110, plaintiff will not waive his right to except, as before, by declaring absolutely, or demanding a plea, &c. (*y*). Plaintiff's attorney, by not excepting to the bail in time, or allowing them to justify without opposition, is deemed to acquiesce in their sufficiency, and in the regularity of the proceedings (*z*). As the notice of exception is to cause bail to justify, any irregularity in it is waived as against defendant by his giving a notice of justification (*a*). An objection to a notice of justification, which stated bail would justify at 10 instead of 11 o'clock, was holden to be waived by plaintiff's appearing to oppose at 10 (*b*). If the affidavit of sufficiency be itself bad, it is not waived by plaintiff's not appearing to oppose the bail (*c*). A defect in the notice of bail is waived by inquiring after them, unless the party produce an affidavit

(*x*) Reg. H. T. 2 Will. IV. R. 15; and see *Hill* v. *Jones*, 11 East, 321.

(*y*) See Chit. Arch. Prac. pp. 575, 587; Lush's Prac. p. 632.

(*z*) *Rex* v. *Sheriff of Surrey*, 2 East, 181; and see Barnes, 81; *Bell* v. *Gate*, 1 Taunt. 162; *Bigg* v. *Dick*, Id. 17; *contrà*, where a trick played upon him, *Fenton* v. *Ruggles*, 1 B. & P. 356; or, where clerks to defendant's attorney are put in, *Wallace* v. *Arrowsmith*, 2 Id. 49.

(*a*) *Hanwell's Bail*, 3 Dowl. 425; *Law's Bail*, 1 Jurist, 797; not so against sheriff, 1 H. Bla. 80; 4 D. & R. 365; 1 Chit. R. 374, 741.

(*b*) *Beal's Bail*, 3 Dowl. 708.

(*c*) *Welsh* v. *Lywood*, 1 Bing. N. C. 258.

to the effect that he cannot find them (*d*); and in the Common Pleas, it seems, any uncertainty in the description of bail is waived by plaintiff's excepting to them (*e*). The bail above may waive an objection to a misnomer of defendant by entering into a bail-piece wherein he is named as he is declared against (*f*).

Costs. The costs of opposition, when it is successful on technical grounds, are not allowed (*g*).

CAPIAS.

The rule of M. T. 3 Will. IV. R. 10, rendering omissions in body or indorsements of writs merely irregular, does not apply, it seems, to the *capias* under 1 & 2 Vict. c. 110, and consequently any material omission or defect may render it void.

Direction. It is ground for setting aside the writ and discharging defendant out of custody, if it be directed to the sheriffs (instead of sheriff) of Middlesex, or to the sheriff (instead of sheriffs) of London (*h*); but if directed properly to sheriffs, the subsequent insertion of the word "sheriff" in the singular will not vitiate (*i*).

(*d*) *Beal's Bail*, 3 Dowl. 708; *Hanwell's Bail*, Id. 425.

(*e*) *Bigg* v. *Dick*, 1 Taunt. 17; and see 1 Bing. N. C. 258.

(*f*) See Chit. Arch. Prac. p. 495.

(*g*) *Beal's Bail*; *Hanwell's Bail*, *supra*.

(*h*) *Jackson* v. *Jackson*, 3 Dowl. 182; *Barker* v. *Weedon*, 2 Dowl. 707.

(*i*) *Irving* v. *Heaton*, 4 Dowl. 638.

In the affidavit of debt, the plaintiff was described as "W. B. junior," and in the *capias* the word "junior" was omitted; the plaintiff's father bore the same names and resided in the same place; the Court held the writ to be irregular, but being against a fraudulent debtor under s. 85 of 1 & 2 Vict. c. 110, plaintiff was permitted to amend on payment of the costs of the motion (*k*). Description of plaintiff.

Though the word "of" after defendant's name is omitted in the new form of *capias*, it is safer to give the residence, especially in the Queen's Bench, where there is a rule for its indorsement (*l*). Residence.

Where defendant was on the point of quitting England, and plaintiff obtained a Judge's order to hold him to bail for £422, but indorsed the *capias* for £422 13*s.* 4*d.*, which was the true debt, the Court allowed the *capias* to be amended on payment of costs, the defendant to be dis- Amount.

(*k*) *Bilton* v. *Clapperton*, 1 Dowl. 386, N. S.; and note, a name without any addition, means the elder, if two of the same name; *Singleton* v. *Johnson*, Id. 356.

(*l*) H. T. 2 & 3 Geo. IV. See under former *capias*, *Rice* v. *Huxley*, 2 Dowl. 231; *Ward* v. *Watt*, 5 Dowl. 94; *Strong* v. *Dickenson*, Id. 99; *Rolfe* v. *Swain*, 5 Dowl. 106. It need not be so particular as in writ of summons, being intended merely as a *designatio personæ*, for the information of the sheriff. *Hill* v. *Harvey*, 4 Dowl. 163. It is not sufficient to state it in copy alone, 2 Dowl. 231; nor to indorse it, *Sindredge* v. *Roe*, 1 Bing. N. C. 6.

charged out of custody on paying into Court £422, and £20 for costs, to be taken out on perfecting special bail (*m*).

Form of action.

Where the form of action was stated "Trespass on the case upon promises," the writ, under 2 Will. IV. c. 39, was holden merely irregular (*n*).

Memorandum.

If in memorandum it be stated that writ is to be executed within four calendar months instead of one calendar month, it is irregular (*o*); and

Indorsement.

omission of the word "London" in the residence of party or attorney by whom it is sued out, when he resides there, is ground for setting aside the copy (*p*).

Irregularity in issuing.

It is now decided that the *capias* may be executed before the service of the writ of summons (*q*); and it may issue into a county palatine, though the amount of the debt be less than £50 (*r*).

Application, &c.

For irregularity in its execution, for mode of application, &c., see "Arrest."

(*m*) *Plock* v. *Pacheo*, 1 Dowl. 380, N. S.

(*n*) *Gurney* v. *Hopkinson*, 3 Dowl. 189.

(*o*) *Shugars* v. *Concanen*, 7 Dowl. 391.

(*p*) *Smith* v. *Pennell*, 2 Dowl. 654; and see *Needham* v. *Bristow*, 1 Dowl. 700, N. S.

(*q*) *Brooke* v. *Snell*, 8 Dowl. 370; and see *Schelleter* v. *Cohen*, 9 Dowl. 277.

(*r*) *Brown* v. *M'Millan*, *same* v. *McPherson*, 8 Dowl. 852; the 1 & 2 Vict. c. 110, s. 3, in effect repealing 7 & 8 Geo. IV. c. 71, s. 7.

By 1 & 2 Vict. c. 110, s. 6, on an application for discharge from custody, the Court or a Judge may "make *such order* therein as to such Court or Judge shall seem fit;" and we have seen the Courts will exercise their power of amendment given by this section (*s*). Amendment.

The principle on which they amend, is not the saving of costs, but to prevent the party from being deprived of his remedy (*t*). They will generally amend where otherwise there will be a failure of justice, and where it does not appear that the plaintiff's conduct has been oppressive, or that defendant has suffered inconvenience, or that the situation of the parties will be changed by the amendment (*u*).

CAPIAS AD SATISFACIENDUM.—(See EXECUTION.)

The *ca. sa.* must pursue the judgment, and if defendant has allowed judgment to be signed against him by a wrong name, he is estopped from objecting that the *ca. sa.* contains such wrong name (*v*). Judgment signed in debt; *ca. sa.* on promises was amended on motion made after a year and a day without a *scire facias* (*x*). Form.

(*s*) As in amount, 1 Dowl. 380, N. S., in addition of "Junior," Id. 386, the copy cannot be amended. *Byfield* v. *Street*, 2 Dowl. 739; *ante*, p. 49.

(*t*) *Per* Alderson, B., 1 Dowl. 386, N. S.

(*u*) *Per* Abinger, C. B., Alderson, B., 1 Dowl. 382, N. S.

(*v*) *Crawford* v. *Satchwell*, 2 Stra. 1218; *ante*, p. 63.

(*x*) *Bicknell* v. *Wetherell*, 1 G. & D. 460.

Issuing. The *issuing* of a *ca. sa.* against a member of the House of Commons is irregular, though it is not intended to execute it (*y*).

Detainer. Defendant having been regularly arrested on an attachment out of Chancery, an irregular *ca. sa.* issued against him, and the Court held this did not interfere with the right of another plaintiff to detain defendant by virtue of a subsequent *ca. sa.* (*z*). Here he was in lawful custody under the attachment when the second *ca. sa.* issued; but if the first arrest be illegal, defendant cannot be detained by subsequent writs proceeding on the original and unlawful arrest (*a*), though he may be detained at the suit of another plaintiff, unless the arrest were illegal by the wrongful act of the sheriff himself.

Test. ca. sa. The issuing of a *testatum ca. sa.*, without an original writ, is only irregular (*b*); and so where the party is taken on an original, which ought to have been a *testatum ca. sa.* (*c*). It is no objection to a *testatum ca. sa.*, that it is executed

(*y*) *Cassidy* v. *Stuart*, 1 Drink. 64.

(*z*) *Wright* v. *Stanford*, 1 Dowl. 272, N. S.

(*a*) See *Collins* v. *Yewens*, 10 A. & E. 570; *Hall* v. *Hawkins*, 4 M. & W. 590; *Watson* v. *Carroll*, Id. 592; *Pearson* v. *Yewens*, 5 Bing. N. C. 489, 567; *Robinson* v. *Yewens*, 5 M. & W. 149; *Barratt* v. *Price*, 1 Dowl. 725; *Barclay* v. *Faber*, 2 B. & Ald. 743.

(*b*) *Thomas* v. *Harris*, 1 Dowl. 793, N. S.; *Warne* v. *Haddon*, 9 Dowl. 960.

(*c*) *Towers* v. *Newton*, 1 Wol. P. C. 149.

more than a year and a day after it has been issued, provided it has been issued within a year from signing judgment, though there is no continuance of the writ upon the roll (*d*).

The affidavits used in support of an application to discharge defendant on the ground of irregularity, must show that he has been actually arrested upon the process (*e*). Application, how.

Where the indorsement of the party's addition and abode (which is required in the Queen's Bench) was omitted, though holden irregular (*f*), yet after a lapse of two terms the application was too late (*g*), and the want of an original *ca. sa.* to support a *test. ca. sa.* is waived by allowing three terms to elapse after the defendant has been arrested on the *test. ca. sa.* before he applies to set aside the latter writ (*h*). When.

CONTINUANCE.—See TRIAL, NOTICE OF.

COUNTERMAND.—See TRIAL, NOTICE OF.

DECLARATION.

A declaration filed or delivered before any appearance entered is a nullity (*i*), but plain- When to declare. Too soon.

(*d*) *Thomas* v. *Harris*, 1 Dowl. 793, N. S.

(*e*) *Green* v. *Rohan*, 4 Dowl. 659.

(*f*) *Bettyes* v. *Thompson*, 7 Dowl. 323. And sheriff is not bound to execute it. *Kenrick* v. *Nanney*, 1 Dowl. 58.

(*g*) *Constable* v. *Fothergill*, 2 Dowl. 591; and see *Esdaile* v. *Davis*, 6 Dowl. 465.

(*h*) *Thomas* v. *Harris*, 1 Dowl. 793, N. S.

(*i*) *Roberts* v. *Spurr*, 3 Dowl. 551; *Watson* v. *Dow*, 5 Dowl. 584; and see *Smith* v. *Painter*, 2 T. R. 719.

tiff may declare immediately after appearance, though before expiration of the eight days (*k*).

oo late. Where plaintiff declares after cause is out of Court, *i.e.* after a year from the service of the writ, the declaration will be set aside, but not the writ, because that is become null by the lapse of time (*l*); and if there be several defendants, and some appear, but the others for a length of time cannot be served, if plaintiff declare against all, and as to the former the year is elapsed since service, though not so as to the latter, unless he has obtained time to declare, it is irregular (*m*).

Delivery. Where an appearance is entered by attorney, delivery to the party is irregular (*n*); so is delivery after nine at night (*o*); and if on a Sunday, it is void (*p*). A person in prison at the suit of a third party, since the Uniformity of Process Act, may be proceeded against as in ordinary cases, and therefore he need not be served with

(*k*) *Morris* v. *Smith*, 4 Dowl. 198.

(*l*) *Wynne* v. *Clarke*, 5 Taunt. 649.

(*m*) *Morton* v. *Gray*, 9 B. & C. 544; and see *Barnes* v. *Jackson*, 1 Bing. N. C. 545; and Reg. H. T. 2 Will. IV. R. 35.

(*n*) Llofft, 332.

(*o*) *Horsley* v. *Purdon*, 2 Dowl. 228; Reg. H. T. 2 Will. IV. R. 50.

(*p*) *Waldegrave's* case, 12 Mod. 607; *Taylor's* case, Id. 667, and cases in margin; *Walgrave* v. *Tayler*, 1 Ld. Raym. 705; *Roberts* v. *Monkhouse*, 8 East, 547; Barnes, 309.

a copy of declaration as ordered by H. T. 2 Will. IV. s. 36; but if the declaration be filed, he should be served with the usual notice (*q*).

Filing and notice of declaration.

If judgment be signed without service of notice of declaration, it is irregular (*r*); but it will not be regarded as *no notice* whatever, where defendant having entered an appearance by attorney, plaintiff by mistake enters one for him, and serves the notice on defendant personally in the country (*s*). And plaintiff having properly entered an appearance for defendant, may serve the notice on defendant's attorney, if he knows who he is (*t*).

Date.

The notice is good from the time of service, and no date is necessary (*u*); if inserted and erroneous, it is immaterial, unless defendant be misled by it (*x*).

Variance.

Should the notice vary in the form of action from the writ of summons, the notice and declaration may be set aside (*y*). Upon a

(*q*) *Boucher* v. *Roe*, 9 Dowl. 329; 1 Wol. P. C. 101, *S. C.*

(*r*) *Alexander* v. *Porter*, 1 Dowl. 299, N. S.

(*s*) *Alsager* v. *Crisp*, 9 Dowl. 353.

(*t*) *Morris* v. *Parry*, Cas. Prac. C. P. 50.

(*u*) *Anon.*, 2 Chit. R. 238. Neither is mention of damages. 6 Taunt. 331.

(*x*) *Coates* v. *Sandy*, 9 Dowl. 381; 2 M. & G. 313, *S. C.*; where it was cured by the particulars attached having a right date.

(*y*) *Robinson* v. *Evrington*, 9 Dowl. 107; *Heywood* v. *Fayrer*, 1 Dowl. 256, N. S.; *King* v. *Skiffington*, 1 Dowl.

writ against two, where the declaration is against one only, a notice entitled as against both, is bad (*z*); but a variation in spelling the plaintiff's name in a single letter, (as "Letherbarrow" for "Litherbarrow") between the writ and notice is immaterial (*a*).

Service of notice.

Service of notice on a Sunday is absolutely void (*b*); after nine o'clock at night, it is irregular; as it is if served before declaration is filed (*c*).

Form of declaration.

The declaration should correspond with the writ in the parties, the character in which they sue and are sued, and in the form of action (*d*).

Parties.

Though the *defendants* may be less in number than in the writ, yet, unless the *plaintiffs* agree in number, the declaration will be irregular (*e*). So it is if the number of defendants be greater than in the writ; or if the writ be against two, and a separate declaration against

686; *Robins* v. *Richards*, 1 Dowl. 378; *Cooke* v. *Johnson*, Id. 247; *post*, "Waiver," p. 104. See also *Graves* v. *Wise*, 2 Wils. 84, where form of action not sufficiently specified in notice, *e. g.* for work and labour—held irregular.

(*z*) *Evans* v. *Whitehead*, 2 Man. & Ryl. 367.

(*a*) *Letherbarrow* v. *Ward*, 5 Jurist, 388.

(*b*) *Moffatt* v. *Carter*, 2 N. R. 75; *Morgan* v. *Johnson*, 1 W. Bla. 628; see Barnes, 309.

(*c*) *Rooke* v. *Sherwood*, 4 Dowl. 363.

(*d*) It need not correspond with sum of money indorsed.

(*e*) *Rogers* v. *Jenkins*, 1 B. & P. 383; and the want of a suggestion of the death of one of the plaintiffs, where it is the fact, is irregular.

each (*f*). Where too many are made defendants in the declaration, the Court will allow their names to be struck out even after issue joined in the proceedings subsequent to the writ (*g*).

Where defendant has been sued by a wrong name, if he appear by the wrong name, plaintiff should declare against him by such name; if he appear by right name, he should be declared against by such name, stating he was sued by the wrong name, as "A., sued by the name of B." If plaintiff appear for him, though knowing the right name, he must either use the wrong, carrying the error into the declaration, where it may be amended; or he may give defendant notice not to appear to the writ, and sue out a new one (*h*). Name.

As plaintiff may narrow, but not extend, his demand, he is allowed to sue generally, and declare specially, (as an executor or *qui tam*,) but not *è converso* (*i*). It is, however, not avail- Character in which parties sue or are sued.

(*f*) *Pepper* v. *Whalley*, 2 Dowl. 821; and see *Carson* v. *Dowding*, 4 Dowl. 297.

(*g*) *Palmer* v. *Beale*, 9 Dowl. 529.

(*h*) See the cases collected in Chit. Arch. Prac. p. 104; see also *Rush* v. *Kennedy*, 7 Dowl. 199.

(*i*) —— *Exors.* v. *Anon.*, 1 Dowl. 97; *Wright* v. *Hunt*, Id. 457; *Knowles* v. *Johnson*, 2 Id. 653; *Douglas* v. *Irlam*, 8 T. R. 416; *Ashworth* v. *Ryal*, 1 B. & Ad. 19; *Watson* v. *Pilling*, 3 B. & B. 4; *Weavers' Co.* v. *Forest*, 2 Stra. 1233.

able as a variance, if after plaintiff's name in writ be added the word "executor," not "*as* executor," and he declare generally (*k*).

Form of action.

Writ in trespass or case, declaration on promises is irregular (*l*); so writ in case, declaration in trespass (*m*); but the writ may contain the *class*, and the declaration the *species* of that class, as the former may be in case, and the latter in trover (*n*); and where the writ was in debt, and declaration in *assumpsit* and debt, the Court refused to set it aside, and left defendant to demur for the misjoinder (*o*).

Title of Court.

If the title of the Court be omitted, or merely indorsed, it is irregular (*p*).

Title of time or date.

If it be not entitled of any day or year, or if entitled of a day different from that whereon it is actually delivered or filed, it is irregular only (*q*). So if the words "in the year of our

(*k*) *Free* v. *White*, 1 Dowl. 586, N. S.; and cases in note, Id. 588; —— *Exors.* v. *Anon.*, 1 Dowl. 97, and note, Id. 98; *Henshall* v. *Roberts*, 5 East, 150.

(*l*) *Edwards* v. *Dignam*, 2 Dowl. 240; *Hudson* v. *Nicholson*, 5 M. & W. 444; Id. 446; *Ward* v. *Tummon*, 4 N. & M. 876; and see 1 H. & W. 8.

(*m*) *Thompson* v. *Dicas*, 2 Dowl. 93; and see Id. 208, and 1 Dowl. 686.

(*n*) *Bate* v. *Bolton*, 4 Dowl. 160.

(*o*) *Rotton* v. *Jeffrey*, 2 Dowl. 637.

(*p*) *Ripling* v. *Watts*, 4 Dowl. 290.

(*q*) *Hodson* v. *Pennel*, 4 M. & W. 373; 7 Dowl. 208, *S.C.*; *Newnham* v. *Hanny*, 5 Dowl. 259; *Topping* v. *Fuge*, 5 Taunt.

Lord" be omitted (*r*). Declaration against the casual ejector dated the fourth year instead of the third year of the Sovereign's reign is irregular (*s*); but it is cured, if, from the date of the notice at the foot of the declaration, tenant must be aware of the term in which he is to appear (*t*). But as the rule H. T. 4 Will. IV. R. 15, requiring pleadings to be entitled of the day and year on which they are delivered, applies to all actions over which the Courts have concurrent jurisdiction (*u*), excluding therefore only real actions, crimes, and revenue cases, it would seem to be irregular not to entitle a declaration in ejectment, or in replevin, in this way (*x*); though if the term and year of the reign be *added*, it may be rejected as surplusage.

330; *Neal* v. *Richardson*, 2 Dowl. 89; *Hough* v. *Bond*, 1 M. & W. 314; *Rowles* v. *Lawrence*, 11 Moore, 338; and see 2 Wils. 256; 1 Id. 304.

(*r*) *Lewis* v. *Duthie*, before Parke, B., at chambers, 1839; cited in Chit. Arch. Prac. p. 145, n. (*p*); and *post*, "Demurrer," p. 105.

(*s*) *Doe d. Pearson* v. *Roe*, 1 Wol. P. C. 53; *Doe d. Gowland* v. *Roe*, 5 Dowl. 273.

(*t*) *Doe d. Willis* v. *Roe*, 5 Dowl. 380; *Doe d. Pearson* v. *Roe*, *suprà*.

(*u*) See *Miller* v. *Miller*, 3 Dowl. 408; *Barnes* v. *Jackson*, 3 Dowl. 404. They were decided to apply to replevin, in *Cole* v. *Arnold*, MS. M. Vac. 1840, by Littledale, J., at chambers; see an article on this subject in the Monthly Law Magazine, for February, 1841.

(*x*) See *Doe d. Smithers* v. *Roe*, 4 Dowl. 374.

Venue. The omission of *venue* in the margin or body can be taken advantage of only by special demurrer (*y*).

Commencement. If the form of action be misstated or omitted in the commencement, it is not ground for special demurrer, but, if available in any way, can only be ground for setting aside the declaration (*z*).

Conclusion. If the old form of *quo minus*, or pledges, be used, it is mere surplusage, and the course is to apply to a Judge to strike it out (*a*).

Application. How. If the notice of declaration vary from the writ of summons, defendant need not confine himself to the notice, but may apply to set aside both declaration and notice (*b*), for he has a right to give credit to the plaintiff for telling truth in his notice (*c*). If the fault be in the writ, as a writ "on a special case" and declaration "on promises," apply to set aside the former (*d*).

For any violation of rules of mere practice,

(*y*) 1 Lutw. 235.

(*z*) *Marshall* v. *Thomas*, 3 Moore & Sc. 98; *Anderson* v. *Thomas*, 9 Bing. 678; and see *Thompson* v. *Dicas*, 2 Dowl. 93; 2 Chitty on Pl., notes to the commencements of declarations.

(*a*) *Alderson* v. *Johnson*, 5 Dowl. 294.

(*b*) *Robinson* v. *Evrington*, 9 Dowl. 107; and see remarks on it, 1 Dowl. 256, N. S.

(*c*) *Id.*

(*d*) *Moore* v. *Archer*, 4 Dowl. 214.

as for introduction of *venue* into the body of the declaration contrary to Reg. H. T. 2 Will. IV. R. 8, or for superfluous counts, or putting dates in the body in figures, or for erasures or contractions, or for miscalculation of sums demanded, and the like, the proper course is not to demur, but to apply to set aside the declaration, or to have it amended at plaintiff's cost, or to have the superfluous matter struck out (*e*).

The misnomer of defendant can no longer be pleaded in abatement, but is only ground for having the declaration amended at cost of the plaintiff (*f*).

An application for any irregularity in the declaration or notice, the delivery, filing, or service thereof, must be made within the time limited for pleading (*g*); and where that time expires in four days, and notice is served on Saturday, though at a late hour, defendant must apply on the following Wednesday, Thursday being too late (*h*). Where a plaintiff de- When.

(*e*) See Lush's Prac. p. 696; and as to the distinctions between defects which are demurrable and merely irregular, see 2 Dowl. 90, and Id. (*a*); 9 Dowl. 682; 4 Camp. 58.

(*f*) 3 & 4 Will. IV. c. 42, s. 11; see "Summons"—name.

(*g*) *Willis* v. *Ball*, 1 Dowl. 303, N. S.; *Hinton* v. *Stevens*, 4 Dowl. 283; *Smith* v. *Clarke*, 2 Dowl. 218; *Newnham* v. *Hanny*, 5 Dowl. 259; *M'Quoick* v. *Davis*, 2 Chit. R. 164; *Minster* v. *Coles*, Id. 237.

(*h*) *Hinton* v. *Stevens*.

clared too soon on the 7th of November, an application on the 25th was allowed (*i*). The application for an amendment of a misnomer of defendant should probably be made within the time limited for pleading in abatement (four days), for which proceeding it is substituted; but, at all events, it must be within the time limited for pleading in bar (*k*).

Waiver.

Such irregularities are waived by defendant's pleading, though under protest (*l*), or, it seems, by obtaining time to plead (*m*), or to pay debt and costs, demanding oyer, security, &c., and perhaps the mere taking out a summons for time,—each being a step indicative of acquiescence (*n*). But not so, pleading, or obtaining time to plead, or procuring order for particulars after an unsuccessful application to a Judge at chambers on the same point (*o*). An objection to the notice of declaration on the ground of variance, is waived by taking the declaration out of the office, if the declaration

(*i*) *Fish* v. *Palmer*, 2 Dowl. 460.

(*k*) *Hinton* v. *Stevens*, 4 Dowl. 283. Amendment refused after issue joined; *Moody* v. *Aslatt*, 3 Dowl. 486.

(*l*) *Tory* v. *Stevens*, 6 Dowl. 275.

(*m*) *Bartrum* v. *Williams*, 4 Bing. N. C. 301.

(*n*) See Lush's Prac. p. 388; but an application for time to settle the action was held no waiver of irregularity in declaration in *Anon.*, 1 Dowl. 23.

(*o*) *Ante*, p. 21.

itself be right (*p*), because defendant has the means of knowing what is the nature of the action in the filed declaration, without taking it out, by inquiring of the clerk of the declarations (*q*); but it is not a waiver perhaps, if the declaration be wrong (*r*). Taking out a summons and obtaining an order, or entitling the affidavit in the wrong name, is a waiver of a misnomer, for it will be at once presumed that defendant was known as well by one name as the other (*s*).

DEMURRER.

Date. If in the date of the demurrer the words "in the year of our Lord" be omitted, it is irregular (*t*).

Marginal note. If a demurrer be delivered without a statement in the margin of some matter of law intended to be argued; or if such statement be

(*p*) *Heywood* v. *Fayrer*, 1 Dowl. 256, N. S.; *Robinson* v. *Evrington*, 9 Dowl. 107.

(*q*) *Robins* v. *Richards*, 1 Dowl. 378.

(*r*) *Heywood* v. *Fayrer*, *suprà*; yet in this case, as he can discover whether the declaration be right or not without taking it out, it would seem to be taking a fresh step after means of knowing of the irregularity.

(*s*) *Finch* v. *Cocker*, 2 Dowl. 383; *Nathan* v. *Cohen*, 3 Id. 370; and see *Shaw* v. *Robinson*, 8 D. & R. 423.

(*t*) *Holland* v. *Tealdi*, 8 Dowl. 320; and see *ante*, p. 100. Though no rule for joinder in demurrer is requisite, yet a demand for such joinder is necessary before judgment can be signed. See *Billing* v. *Kightly*, 7 Scott, 844.

frivolous, it may be set aside *as irregular*, and leave given to sign judgment, as for want of a plea (*u*).

A marginal note, stating that "the plea is no answer to the action," is insufficient, but the Court allowed it to be amended on payment of costs (*x*); if the demurrer be special, a reference to the causes stated in the body is sufficient (*y*).

What are not frivolous.

Demurrers for the following causes have been holden not to be frivolous;—that it was alleged in declaration defendant was indebted to plaintiff, instead of plaintiffs (*z*); or in an action by indorsee *v.* acceptor, that it was not stated to whose order the bill was drawn (*a*), it being merely drawn "to order;" so where declaration stated the bill to be drawn by A. for B. and Co., and by him indorsed to plaintiff, that there was no authority shown for the indorsement (*b*); and where, to an action on a note, defendant having pleaded that he accepted a bill drawn by plaintiff, and plaintiff received it in satisfaction of the note, plaintiff replied, denying the drawing, acceptance, and receipt, in satisfac-

(*u*) H. T. 4 Will. IV. R. 2; and see Jervis's New Rules, p. 105, n.

(*x*) *Ross* v. *Robeson*, 3 Dowl. 779.

(*y*) *Lyndhurst* v. *Pound*, 5 Dowl. 459; *Berridge* v. *Priestley*, Id. 306.

(*z*) *Tyndall* v. *Ullesthorne*, 3 Dowl. 2.

(*a*) *Hart* v. *Proudfoot*, 8 Dowl. 306.

(*b*) *Dawson* v. *Parry*, 6 Scott, 890.

tion, a demurrer for multifariousness was not set aside, though it was sworn also that the plea was false (*c*).

What are frivolous.

To set aside a demurrer as frivolous, it must admit of no argument (*d*). It must be manifestly frivolous on the face of it, or be pleaded in direct opposition to some decided case expressly on the point (*e*). The following have been holden frivolous:—That plea was dated 1832, instead of 1833 (*f*); so a demurrer to declaration, because it alleged that defendant was indebted to plaintiff "for goods sold to defendant by the *plaintiff* at *his* request" (*g*); so in action by indorsee *v.* acceptor to declaration, because it did not state who the drawers were, it alleging that J. & C. made their bill, and required defendant to pay to the drawer's order (*h*); a *general* demurrer to replication of *de injuriâ* to a plea of gaming in an action on a bill of exchange (*i*); a demurrer, because in the commencement of a declaration at the suit

(*c*) *Edwards* v. *Greenwood*, 5 Bing. N. C. 476.

(*d*) *Turnor* v. *Standage*, 5 Scott, 556; *Dawson* v. *Parry*, 6 Scott, 890; *Dalton* v. *M'Intyre*, 1 Dowl. 76, N. S.

(*e*) *Per* Alderson, B., in *Papineau* v. *King*, E. T. 1842, 6 Jurist, 537.

(*f*) *Neal* v. *Richardson*, 2 Dowl. 89.

(*g*) *Dellevene* v. *Percer*, 9 Dowl. 244; and see *Pigeon* v. *Osborne*, Id. 511.

(*h*) *Knill* v. *Stockdale*, 8 Dowl. 772.

(*i*) *Curtis* v. *Headfort*, 6 Dowl. 496.

of two plaintiffs, it stated "defendant was summoned to answer *plaintiff*" (*k*); or because in a *second* count of a declaration, at the suit of a surviving partner, the decease of the other partner (already averred in the first count) was omitted (*l*); or to declaration on a bill of exchange and account stated, with one promise "to pay the last-mentioned several monies on request," on the ground of no promise being stated to the count on the bill (*m*); or one demurrer to counts for money lent, money had and received, and money due on an account stated, because they did not specify any time (*n*).

The following would now probably be holden frivolous:—To declaration on a promissory note, that it does not appear the words "value received" are in the note (*o*); or that a count on

(*k*) For such commencement might be omitted altogether, *Lyng* v. *Sutton*, 4 Moore & Scott, 417; and it is no ground of demurrer if form of action be omitted or misstated, *Marshall* v. *Thomas*, 3 Moore & Sc. 98; *Anderson* v. *Thomas*, 9 Bing. 678.

(*l*) *Underhill* v. *Hurney*, 3 Dowl. 495.

(*m*) *Chevers* v. *Parkington*, 6 Dowl. 75. There being only two counts, the words "*several* last-mentioned *monies*" would seem to apply to both.

(*n*) *Jackson* v. *Cawley*, 6 Dowl. 388; as it was evident, that except on an account stated, no time need be alleged; and see *Leaf* v. *Lees*, 7 Dowl. 189, where decided it is not now necessary to allege any time, even when an account was stated.

(*o*) *Kinahan* v. *Palmer*, 2 Jones, R. (Exch. Irel.), 131, and

a bill alleges that the period of payment "is now elapsed," instead of "had elapsed before the commencement of this suit" (*p*).

Application. How to apply.

The want of a marginal note, or its being frivolous, is no ground for objecting to the argument of the demurrer, when called on; the only effect being that it may be set aside "as irregular" (*q*). In support of an application to set aside a demurrer as irregular, there must be an affidavit stating the substance of the pleadings, or a copy of them must be produced; and the rule *nisi* should be drawn up, it seems, on reading the pleadings (*r*); and a rule for setting aside a demurrer to the replication, should be drawn up on reading the pleas, as well as the subsequent pleadings in the cause (*s*). Where the rule was drawn up on reading the affidavit only, (which affidavit, however, was insufficient,) the Court discharged it (*t*). It is only a rule *nisi* in the first instance (*u*).

When to apply.

As the rule of Court says it may be set aside

MS. note of *Crisp* v. *Griffiths*, there cited by Joy, C. B. It had been decided to the contrary in 2 Dowl. 635; 3 Id. 243.

(*p*) *Owen* v. *Walters*, 5 Dowl. 324; see 4 Id. 759.

(*q*) *Lacey* v. *Umbers*, 3 Dowl. 732.

(*r*) 1 C. M. & R. 900, n. (*a*); and see *Howarth* v. *Hubbersty*, 3 Dowl. 455.

(*s*) *Hamer* v. *Anderton*, 9 Dowl. 119.

(*t*) *Howarth* v. *Hubbersty*, *suprà*.

(*u*) *Spencer* v. *Newton*, 14 Leg. Observer, 82; *Kinnear* v. *Keane*, 3 Dowl. 154.

Waiver.

"as irregular," the application must be within the usual time limited for irregularities, and it is too late after joining in demurrer (*x*) or the like.

DISTRINGAS.

When and how it may issue.

A *distringas* may issue after expiration of the writ of summons (*y*). Where the writ of summons expired on the 5th of October, and an *alias* issued on the 5th of December, and plaintiff not being able to serve this, obtained a *distringas*, which required appearance to the *first* writ, it was holden regular (*z*). Where it appears on the face of the affidavit used to obtain a *distringas* to compel appearance, that defendant is abroad, the entry of an appearance for defendant and judgment signed thereon are irregular, as the plaintiff should have proceeded to outlawry (*a*). And in most cases the Courts or a Judge will set aside this writ, for its having issued on a defective affidavit (*b*); but not so if facts appear whence the Judge might have inferred that a more efficient process was requisite, even though a sufficient number of calls

(*x*) *Norton* v. *Mackintosh*, 7 Dowl. 529.

(*y*) *Bromage* v. *Ray*, 9 Dowl. 559.

(*z*) *Pearce* v. *Swain*, 9 Dowl. 724; and see *Norman* v. *Winter*, 7 Dowl. 304.

(*a*) *Partridge* v. *Wallbank*, 2 M. & W. 893.

(*b*) *Id.*; and see *White* v. *Johnson*, 1 Gale, 108.

were not made (*c*), nor will it be set aside merely because affidavit omits to aver that a copy of the writ was left at defendant's house (*d*).

In itself.

The Courts will not set aside a *distringas* because the copy served varies from the original, unless it alter the sense and can mislead (*e*); but it has been set aside for omitting the indorsement of the amount (*f*).

Return of.

A writ of *distringas* returnable on a Sunday, is a nullity (*g*).

How to apply.

The affidavit used to set aside a *distringas* must be entitled in the same names as are stated in the *distringas*, though they be incorrectly stated (*h*). It will not be set aside, however insufficient the affidavit whereon it was obtained, as to the fact of defendant keeping out of the way, unless it be distinctly sworn on his part that the place, at which the attempts to serve him were made, was not at the time his place of abode, or that he did not keep out of the way to avoid being served with process (*i*). Where the irregularity is in the

(*c*) *Gale* v. *Winks*, 5 Dowl. 348.

(*d*) *Smith* v. *Macdonald*, 1 Dowl. 688.

(*e*) *Toms* v. *Nash*, 2 Scott's N. R. 598. "Andrew" for "Andrews" immaterial. *Id.*

(*f*) *Gale* v. *Winks*, 5 Dowl. 348.

(*g*) *Morrison* v. *Manley*, 1 Dowl. 773, N. S.

(*h*) *Borthwick* v. *Ravenscroft*, 7 Dowl. 393.

(*i*) *Toms* v. *Nash*, 2 Scott's N. R. 598.

issuing of the writ, the party, it seems, should move to discharge the rule for the issuing of the *distringas* (*k*).

When to apply.

The application should be made within the eight days limited for appearance—(*i. e.* eight days inclusive after the return). Where it was returnable on the 4th of November, a motion on the 13th was too late (*l*). And where in the teste of the copy the date was omitted, and the copy served on the 28th of August, an application on the 10th of November was held too late (*m*).

Waiver.

Objections to a *distringas* may be waived by the same steps, as waive defects in the writ of summons, which see.

ELEGIT.—(See EXECUTION.)

Where land is extended on an *elegit*, no other writ than an *elegit* can issue, unless the plaintiff be evicted; but if the writ be avoided by matter extrinsic, a new writ of any kind may issue, or if it be void on the face of it, plaintiff should apply to the Court to vacate the writ and award another (*n*).

(*k*) See this course pursued in *Cooper* v. *Folkes*, 9 Dowl. 47.

(*l*) *Swift* v. *Wright*, 7 Dowl. 863; *Wright* v. *Warren*, 2 Dowl. 724. See "Summons."

(*m*) *Quilters* v. *Neeley*, 9 Dowl. 139.

(*n*) 2 Saund. 68 c.; Chit. Arch. Prac. p. 446, n. (*c*).

ERROR, WRIT OF.

When it may be quashed.

There are certain defects in a writ of error, or in its issuing, for which on motion it will be quashed, or its allowance be set aside; and in some cases it may be treated as a nullity, and then, of course, not operating as a *supersedeas*, execution may be sued out, notwithstanding its allowance. As an example of the first branch, if it be sued out before judgment is signed, it will be quashed (*o*); and, as an example of the second, it may be passed over as a nullity, if the notice of its allowance misdescribe the form of action (*p*), or contain no statement of the ground of error; but if the statement be merely frivolous or insufficient, an application must be made to the Court or a Judge, before execution is issued (*q*).

When a nullity.

So it is a nullity where bail, when required, are not put in and perfected (*r*), or notice of them is not duly given (*s*), or justification not

(*o*) *Prydyerd* v. *Thomas*, 1 Vent. 96.

(*p*) As case for trespass, *Green* v. *Okill*, 1 Dowl. 422; or trespass for replevin, *Hills* v. *Spilsbury*, Id. 421.

(*q*) Reg. H. T. 4 Will. IV. R. 9; *post*, "Application," p. 114.

(*r*) Bail are not required, where judgment below was for defendant in the original action, (see Chit. Arch. Prac. p. 364;) nor in cases of error *coram nobis* or *vobis*. *Knight* v. *Thynne*, 9 Dowl. 984; *Alstrop* v. *Sexton*, 1 Dowl. 33, N. S.

(*s*) *Attenbury* v. *Smith*, MS. E. T. 1821, cited Chit. Arch. Prac. p. 366.

(*t*) *Gould* v. *Holmstrom*, 7 East, 582.

made within the proper time (*t*), or where plaintiff does not proceed within the limited times with his writ (*u*). So error never operates as a *supersedeas*, until a notice of allowance be served, containing a statement of some particular ground of error intended to be argued (*x*); but its being irregular does not prevent it from acting as a *supersedeas*, before it is quashed (*y*).

After service of notice of allowance, if the defendant in error (where bail is required) take out execution before the time for putting in bail has expired, and bail be afterwards regularly put in, the execution will be set aside (*z*).

Application. A motion to set aside the allowance of the writ or to quash it, is made to the Court of Error, after it has been returned thereto by the Court below (*a*), the Court to which it is directed having no jurisdiction over the writ, and therefore not having the power to set it aside (*b*). It may be quashed as to part, and stand good as to part (*c*). The affidavits in support of the motion must be entitled in the Court of Error, and in the cause as it stands there (*d*).

(*u*) *Dow* v. *Clark*, 2 Dowl. 302.

(*x*) Reg. H. T. 4 Will. IV. R. 9.

(*y*) *Laroche* v. *Wasbrough*, 2 T. R. 737.

(*z*) 2 T. R. 44; see Chit. Arch. Prac. p. 359.

(*a*) *A'Court* v. *Swift*, 1 Ld. Raym. 329.

(*b*) *Jones* v. *De Lisle*, 3 Bing. 125; *Lloyd* v. *Skutt*, 1 Doug. 350; *Boreman* v. *Brown*, 1 Dowl. 281, N. S.

(*c*) *Burr* v. *Atwood*, 1 Ld. Raym. 328.

(*d*) *Gandell* v. *Rogier*, 4 B. & C. 862.

A writ of error is amendable, for any variance from the original record, or *other defect*, by 5 Geo. I. c. 13, s. 1, and it has been so amended without costs (*e*), and after motion to quash the writ (*f*). If made returnable, however, before judgment signed, no amendment, it seems, will be allowed (*g*). Amendment.

EXECUTION.—(See Fi. Fa., Ca. Sa.)

If a writ of execution be irregular, it may be set aside by the Court or a Judge; and if it be a *ca. sa.*, defendant may move to be discharged out of custody, or that sheriff repay the money levied (*h*); or on a *fi. fa.*, that goods or money levied may be restored to defendant.

If it be sued out in defiance of an injunction, a Court of Law will not set it aside (*i*). Where judgment and execution were of the term generally, but the fact was that the former was signed, and execution issued after the death of defendant, the Court refused to set aside the *fi. fa.* (*k*); but where a defendant died between Suing out.

(*e*) *Gardner* v. *Merrett*, 2 Stra. 902.

(*f*) *Vereiet* v. *Raphael*, Cowp. 425.

(*g*) *Wright* v. *Canning*, 2 Stra. 807.

(*h*) *Morgan* v. *Short*, 4 Bing. 147.

(*i*) *Forman* v. *Jayes*, 5 B. & Ad. 835; see also *Winter* v. *Lightbound*, 1 Stra. 301.

(*k*) *Watson* v. *Maskell*, 2 Dowl. 810; *Brocker* v. *Pond*, Id. 472; *Peacock* v. *Day*, 3 Dowl. 291.

eleven and twelve o'clock in the morning, and a writ of *fi. fa.* was issued out between two and three in the afternoon of the same day, and tested on the same day, it was set aside (*l*).

Without *scire facias.*

Execution issued after a year and a day from the time of signing judgment is not, it seems, *void*, but only voidable by a writ of error (*m*), or capable of being set aside (*n*). In a recent case, however, it was holden, that for this defect defendant might move the Court after the lapse of thirteen years (*o*); but not any of the authorities treating it as of less consequence were there cited; and according to one report of the case (*p*), it was so decided, on the ground that a party in custody on final process is never barred by *laches*, though this doctrine is now overruled (*q*), and in the other report, it is said to be a nullity, as being contrary to the direct language of the stat. Westm. 2. (13 Edw. I. stat. 1); but in a subsequent case, where execution had been suspended by the agreement of

(*l*) *Chick* v. *Smith*, 8 Dowl. 337.

(*m*) *Putland* v. *Newman*, 6 M. & S. 179; *Walker* v. *Thelluson*, 1 Dowl. 277, N. S.; and see 9 Dowl. 1009.

(*n*) *Patrick* v. *Johnson*, 3 Lev. 404; *Shirley* v. *Wright*, 1 Salk. 273; and see *Habberton* v. *Wakefield*, 4 Camp. 58; Mr. Lush treats it as being *void*.

(*o*) *Mortimer* v. *Piggot*, 4 A. & E. 363, n.; 2 Dowl. 615, *S. C.*

(*p*) 4 A. & E. 363, n.

(*q*) *Tarber* v. *French*, 4 A. & E. 362.

the parties, a *scire facias* was decided to be unnecessary (*r*), and on this statute being cited, it was said by the Court to have given a *sci. fa.* "rather *in aid* of plaintiffs than in restraint of them," as being less expensive and dilatory than a new action on the judgment, which was their only remedy after such a lapse of time, at common law.

In a recent case (*s*), the suing out execution in ejectment *ten years* after judgment without a *sci. fa.*, was regarded as so substantial a defect, as not to be waived by a delay from the 30th December to the 8th of May; and *per* Wightman, J., "I think the lessor of the plaintiff has been irregular *in materialibus;* the omission to sue a *sci. fa.* after a lapse of ten years, would be a cause of error that was apparent on the face of the record. No *sci. fa.* is necessary where a *ca. sa.* has been sued out within the year and day, though not returned and filed within that period (*t*).

A *ca. sa.* may issue on a judgment more than a year old without a *sci. fa.*, where the defendant has agreed by parol to waive such *sci. fa.* (*u*).

(*r*) *Hiscocks* v. *Kemp*, 3 A. & E. 679; and see *Collins* v. *Yewens*, 10 A. & E. 571, n. (*e*).

(*s*) *Goodtitle d. Murrell* v. *Badtitle*, 9 Dowl. 1009.

(*t*) *Simpson* v. *Heath*, 5 M. & W. 631; and see *Thomas* v. *Harris*, 1 Dowl. 793, N. S.

(*u*) *Anon.*, B. C. E. T. 1842, 6 Jurist, 537.

From what Court.

For sums of money, or costs decreed in Chancery, the writ of execution must now issue out of Chancery (*x*).

On rules of Court.

Rules of Court for *the payment of money* are to have the effect of judgments for the purpose of execution. And where a sum of money was awarded under an agreement of reference, and afterwards the agreement was made a rule of Court, it was holden that execution could not issue on such rule, the 18th section of 1 & 2 Vict. c. 110, applying for such purpose only where money payable by the rule is expressed in the rule itself (*y*).

Testat. writ.

The omission of an original *ca. sa.* previously to suing out a *test. ca. sa.* is a mere irregularity, unavailable to defendant after a lapse of six years (*z*).

After partial execution.

If any writ be actually executed, though in part only, it must be returned before another writ issues (*a*). Sheriff having seized defendant's goods under a *fi. fa.*, it was agreed between plaintiff and defendant that the sheriff should withdraw on payment of part of the debt, and that the judgment should stand as a security for

(*x*) 1 & 2 Vict. c. 110, s. 20; *In re Stanford*, 1 Dowl. 183, N. S.

(*y*) *Jones* v. *Williams*, 11 A. & E. 175; and see *Rickards* v. *Patterson*, 8 M. & W. 312.

(*z*) *Warne* v. *Haddon*, 9 Dowl. 960; *ante*, "Ca. Sa."

(*a*) *Hodgkinson* v. *Whalley*, 2 C. & J. 86; *Wilson* v. *Kingston*, 2 Chit. R. 203.

the residue, which was to be paid by instalments, and on default, plaintiff was to re-enter into possession. Default being made in the first instalment, and a second *fi. fa.* having issued without the first being returned, it was set aside for irregularity; the entering into possession, and payment of part of the debt by compulsion, amounting to a levy (*b*). Where a levy is made, the subsequent process should, after the return of the first, recite the amount levied, and be for the sum really due, *i. e.* the whole debt minus that amount (*c*). So, a return of the prior writ is necessary, where the amount for which the levy is made, *except a small sum*, is swallowed up by the landlord's claim for rent (*d*); but not so where the officer found the *whole* of the goods seized under a distress for rent and taxes (*e*), or where he withdrew in consequence of defendant's saying he had sold the goods to cheat the plaintiff (*f*).

By 1 & 2 Vict. c. 110, s. 20, the Judges were empowered to issue new forms of writs; orm.

(*b*) *Chapman* v. *Bowlby*, 1 Dowl. 83, N. S.; 8 M. & W. 249, *S. C.*; where said by Parke, B., "the test" (of a levy) "will be whether or no the sheriff is entitled to poundage."

(*c*) Id. *per Cur.*

(*d*) *Hodgkinson* v. *Whalley*, 2 C. & J. 86.

(*e*) *Dicas* v. *Warne*, 2 Dowl. 762.

(*f*) *Knight* v. *Coleby*, 5 M. & W. 274; and so, it would seem, if the first execution be *void*.

and in Hilary vacation, 1839, 2 Vict., they published several forms of *elegit* and *fi. fa.*, and by a general rule prefixed to them, it is ordered, "that any variance, not being in matter of substance, shall not affect the validity of the writs sued out."

Direction. The sheriff is the immediate and primary officer of the Courts, and to him must be directed the ordinary process of execution. If directed to the bailiff of a liberty, it is void, even though the execution may ultimately belong to him (*g*).

Variance. Writs of execution must be conformable to the judgment, or show on their face some sufficient reason for the variance.

1. Parties. Thus, on a judgment for or against two, the execution must be *primâ facie* for the benefit of or against both (*h*); and if a party die between judgment and execution, unless the writ be dated back as of the day on which judgment was signed, it must contain a suggestion of the death; and so, (where it is the fact,) of marriage.

2. Amount. The writ must be sued out in the body of it for the exact amount given by the judgment, or show a good reason for the variance; but it must

(*g*) *Grant* v. *Bagge*, 3 East, 128; and see *Jackson* v. *Hunter*, 6 T. R. 71.

(*h*) *Clarke* v. *Clement*, 6 T. R. 525.

be indorsed for the sum that is really due; and it is equally irregular whether the amount be *less* or more than in the judgment (*i*).

3. Subject matter.

So a general judgment against an insolvent debtor will not warrant a special execution against his future effects, but such execution is void (*k*).

4. Names.

Where defendant executed a warrant of attorney by a wrong name, and judgment was entered up and execution issued by such name, it was holden regular, and that the sheriff was bound to execute it, the defendant being estopped by the judgment (*l*).

Teste.

Writs of execution may be tested on the day on which they are issued, and be made returnable immediately after the execution thereof.—3 & 4 Will. IV. c. 67, s. 2.

Indorsement.

The omission of the indorsement, required by 2 Geo. II. c. 23, s. 22, of the attorney's name, would render the writ irregular, if not void (*m*).

(*i*) *Webber* v. *Hutchins*, 8 M. & W. 319; 1 Dowl. 95, N. S.; where judgment for £33,348 14*s.* and *fi. fa.* thereon for £3,348 15*s.* 8*d.*; and see where too little indorsed, *Hunt* v. *Passmore*, 2 Dowl. 414; and where too much, *Tilby* v. *Best*, 16 East, 163.

(*k*) *Buxton* v. *Mardin*, 1 T. R. 82.

(*l*) *Reeves* v. *Slater*, 7 B. & C. 486. See "Capias,"—name; *contrà*, on Mesne Process.

(*m*) See 12 Geo. II. c. 13, s. 4; Lush's Prac. p. 503; and see Reg. M. T. 1 Will. IV. R. 1; Exch. R. H. 2 & 3 Geo.

Bailiff's warrant.

The warrant must be addressed to the officer by name, and if a different name be inserted after it has left the sheriff's office, the arrest will be illegal (*n*). The omission of the name of the attorney and agent, by whom the writ is sued out, it is expressly enacted by 12 Geo. II. c. 13, s. 4, shall not vitiate the warrant. Where the *ca. sa.* being in an action on "promises," and the warrant instead thereof had the word "damages," it was decided to be immaterial, as the sheriff would justify under the writ, and not under the warrant (*o*); and, as a general rule, so long as the latter has on the face of it a valid authority to do the act directed by the writ, it will be good (*p*).

When and how executed.

Execution executed on a Sunday is void. The breaking of an outer door not only subjects the party to an action, *but avoids the execution altogether*, so that defendant will be discharged for this cause out of custody (*q*).

Return of writs.

If the rule to return a writ be taken out by

IV. Q. B.; *Clarke* v. *Palmer*, 9 B. & C. 152; *Bettyes* v. *Thompson*, 7 Dowl. 322; *Brown* v. *Hudson*, 8 Id. 4.

(*n*) *Housin* v. *Barrow*, 6 T. R. 122; *Hann* v. *Capell*, Barnes, 199; see *Pearson* v. *Yewens*, 5 Bing. N. C. 489, 567; *Collins* v. *Yewens*, 10 A. & E. 570.

(*o*) *Rose* v. *Tomblinson*, 3 Dowl. 49; and see *Williams* v. *Lewis*, 1 Chit. R. 611.

(*p*) See Lush's Prac. p. 505.

(*q*) *Hodgson* v. *Towning*, 5 Dowl. 410; and see *Yates* v. *Delamayne*, Bac. Ab. "Execution," N.

a new attorney, the order to change must be served on the sheriff, or the rule may be set aside (*r*).

Ca. sa. whereon the party is discharged for an irregularity is no satisfaction of the debt (*s*); therefore he may be taken on another writ. Consequences of irregular execution.

An outlaw (*t*), or assignees of a bankrupt (*u*), or tenant in possession, who has been served with declaration but has not appeared, judgment having been signed against the casual ejector (*v*), may apply to set aside execution, though, in the last case, costs will not be awarded against the casual ejector (*x*). Mode of applying. Who may.

To set aside a *ca. sa.* for a variance from the judgment in the name of the defendant, the affidavits should be entitled so as to accord with the judgment (*y*). Where plaintiff obtained a verdict at the Spring assizes, and the defendant died on the 8th of April, and costs were taxed on the 21st, judgment signed on 22nd, and *fi. fa.* issued on the same day, tested on the first day of term, the Court refused to set aside the How.

(*r*) *Phillips* v. *Berkeley*, 5 Dowl. 279.

(*s*) *Collins* v. *Beaumont*, 10 A. & E. 225; *M'Cormick* v. *Melton*, 1 C. M. & R. 525.

(*t*) *Walker* v. *Thelluson*, 1 Dowl. 277, N. S.

(*u*) *Webber* v. *Hutchins*, 8 M. & W. 319.

(*v*) *Goodtitle d. Murrell* v. *Badtitle*, 9 Dowl. 1009.

(*x*) *Id.*

(*y*) *Thorpe* v. *Hook*, 1 Dowl. 494.

fi. fa. for having issued after the death of defendant without a *sci. fa.*, because the *fi. fa.* on the face of it was regular, and the objection should have been to the judgment (*a*).

If judgment and execution be set aside for irregularity, no *sci. fa.* is needed to obtain restitution, but if it be not made, an attachment will be granted on the rule for a contempt (*b*).

When to apply.

Where execution was sued out ten years after judgment without a *sci. fa.*, a delay from the 30th of December to the 8th of May, was not considered too long (*c*); and where *test. ca. sa.* issued without an original, six years were holden too late (*d*). Where a motion, made in March, 1841, was, on account of a variance in the form of action between the judgment and *ca. sa.*, executed November, 1839, Alderson, B., held it to be too late (*e*). Where the writ executed on the 3rd of March varied from the judgment, an application by the assignees of the defendant on the 20th of April, was in time (*f*).

Amendment.

Writs of execution may be amended under the Statute of Amendments by the judgment,

(*a*) *Watson* v. *Maskell*, 2 Dowl. 810.
(*b*) *Anon.*, 2 Salk. 588.
(*c*) 9 Dowl. 1009.
(*d*) Id. 960.
(*e*) *Bicknell* v. *Wetherell*, 1 G. & D. 460.
(*f*) *Webber* v. *Hutchins*, 8 M. & W. 319.

or by the award of it on the roll, or by former process (*g*), and this has been allowed even after an application to set them aside, unless the rights of third parties, as assignees, bail, &c., have intervened, and they would suffer by the amendment (*h*). Thus the amount has been amended (*i*), where damage has not been sustained by an excessive levy; and so the form of action, where it varied from judgment, though the application was made after the lapse of a year and a day, and no *sci. fa.* sued out (*k*). Where the judgment and all prior proceedings were in the name of John H., but the writs of *sci. fa.* (returned *nihil*), award of execution, the *ca. sa.* and warrant were against James H., the Court amended the error, as defendant did not show he would sustain any disadvantage through it (*l*). Where a party having been arrested by a valid writ, was discharged on the ground of privilege, and was then arrested by an irregular *ca. sa.*, which under the circum-

(*g*) Tidd, (9th ed.) p. 713.

(*h*) *Webber* v. *Hutchins*, 8 M. & W. 319.

(*i*) *Arnell* v. *Wetherby*, 3 Dowl. 464; *M'Cormack* v. *Melton*, 3 N. & M. 881; *Monys* v. *Leake*, 8 T. R. 416, n. If execution levied for a greater sum than really due, it will in general be amended unless defendant has suffered by excess. *Laroche* v. *Wasbrough*, 2 T. R. 737.

(*k*) *Bicknell* v. *Wetherell*, 1 G. & D. 460.

(*l*) *Thorpe* v. *Hook*, 1 Dowl. 501.

stances should have been a *test. ca. sa.*, the Courts would not amend it by a former *ca. sa.* which bore a later date (*m*). On motion by one of several execution creditors to amend indorsement of *fi. fa. de bonis ecclesiasticis* by increasing the sum to be levied, it was holden that the other creditors, and the officer to whom it was directed, should be made parties to the rule (*n*).

FIERI FACIAS.—(See EXECUTION.)

Issuing and execution of.

A *ca. sa.* issued against four joint defendants, under which one was taken in execution, and discharged under the Insolvent Act; plaintiff afterwards issued a *fi. fa.* against the four defendants, under which the sheriff seized the goods of the one who had been discharged. Held (*dub.* Parke, B.), that the writ was irregular in issuing against a party discharged under the Insolvent Act, and that it should have issued against the three only, suggesting the discharge of the one, and held by Parke, B., that at all events it should not have been executed against the goods of the defendant so discharged (*o*). Where a *fi. fa.* issued and

(*m*) *Towers* v. *Newton*, 9 Dowl. 576.

(*n*) *Hammond* v. *Navin*, 1 Dowl. 351, N. S.

(*o*) *Raynes* v. *Jones*, 1 Dowl. 373, N. S.; and see 1 & 2 Vict. c. 110, s. 91.

was executed after service of allowance of a writ of error, the Court would not set it aside, but left the party to his action (*p*). A levy on the goods of an accommodation acceptor, who swore he had not been served with any process, was decided to be a mere irregularity (*q*).

Form. Variance.

If the mandatory part of the writ be for more or less than judgment, it is irregular (*r*). The judgment is entered from the time of entering the *incipitur*, but the latter is to be regarded only as instructions for drawing up the judgment, and a variance between that and the writ in the amount is immaterial, where the writ agrees with the sum in the judgment roll. Thus, when judgment was signed for the aggregate sum in all the counts in debt, and a *fi. fa.* issued thereon only for the real debt, defendant having obtained a summons to set aside the writ for irregularity, on the ground of variance, the plaintiff before the hearing carried in the judgment roll with a *remittitur damna* entered on it for the difference between the aggregate sum and the real debt. Held, the writ could not be set aside (*s*).

(*p*) *Bleasdale* v. *Darby*, 9 Price, 606 (the rule moved with costs and discharged without).

(*q*) *Holmes* v. *Russell*, 9 Dowl. 487.

(*r*) *Webber* v. *Hutchins*, 8 M. & W. 319; and see *Cobbold* v. *Chilver*, 11 Law Journ. 173, C. P. (N. S.)

(*s*) *King* v. *Birch*, 11 Law Journ. 183, Q. B. (N. S.)

Landlord's rent.

If the *fi. fa.* be void, as on a warrant altered without authority, so as to be no levy in law, the sheriff is not liable to the landlord, on account of non-payment of the rent, under 8 Anne, c. 14, s. 1 (*t*).

Mode of taking advantage.

The validity of an execution under a *fi. fa.* cannot be impeached at *Nisi Prius* for irregularity (*u*).

ISSUE.

Irregular in itself.

The issue, if irregular in itself, may be set aside or amended at the costs of the party in fault.

Date of writ of summons, and commencement of suit.

If the date of the writ of summons be omitted, the issue is irregular (*x*); so if it omit to state the commencement of the suit (*y*); but plaintiff, on payment of costs, will be allowed to amend.

Too many defendants.

Where too many persons were made defendants, the plaintiff was allowed to strike out the name of one (or more) in all the proceedings subsequent to the writ, on payment of the costs

(*t*) *Hann* v. *Capel*, Barnes, 199.

(*u*) *Habberton* v. *Wakefield*, 4 Campb. 58.

(*x*) *Currey* v. *Bowker*, 9 Dowl. 523; and see *Cooze* v. *Neumegen*, 1 Dowl. 429, N. S.; *Ikin* v. *Plevin*, 5 Dowl. 594; *Ball* v. *Hamlet*, 3 Dowl. 188; *Cox* v. *Painter*, 1 W. W. & H. 228.

(*y*) *Williams* v. *Calverley*, 14 Legal Observer, 13, cited 1 Dowl. 573, N. S.

of the defendants, and the remaining defendants to plead *de novo* (*z*).

The form of action need not be inserted (*a*). Form of action.

Where two issues, one of law and one of fact, were joined on pleas to the same count, and the issue contained an entry of *venire ad triandum* alone, omitting that of *quam inquirendum*, the Court set it aside with costs; though the issue of fact went to the whole cause of action in the declaration (*b*); but not so, where, though inserted in the issue, the *quam inquirendum* clause was omitted in the record, plaintiff having given defendant notice that he did not intend to assess damages (*c*). Venire to assess damages.

The return day of the *venire facias* may be either "forthwith" or on a day certain (*d*). Return of ven. fac.

The *similiter*, by whichever party added, does not require a date, as it is not a pleading within the rule H. T. 4 Will. IV. R. 1 (*e*). Similiter.

(*z*) *Palmer* v. *Beale*, 9 Dowl. 529; and see *Coldwell* v. *Blake*, 3 Id. 656; and 1 Chitty on Pl. p. 13, n. (*x*).

(*a*) *Ball* v. *Hamlet*, 3 Dowl. 188; *Fergusson* v. *Mitchell*, 4 Dowl. 513; it is omitted in the form given by the New Rules.

(*b*) *Codrington* v. *Lloyd*, 1 P. & D. 157; 8 A. & E. 449, *S. C.*

(*c*) *Hiam* v. *Smith*, 6 Dowl. 710.

(*d*) *Drake* v. *Gough*, 1 Dowl. 573, N. S.

(*e*) *Edden* v. *Ward*, 12 A. & E. 428. A *similiter* entitled in a wrong Court has been held to be a nullity. *Ray* v. *Good*, 5 Dowl. 295.

Trial before sheriff.

If the issue be delivered in the form of an issue at *Nisi Prius*, and an order be then obtained for a trial before the sheriff, plaintiff should also obtain an order to amend the issue; and if he does not, it will be set aside with the order and notice of trial (*f*).

Variance from pleadings.

The issue purports to be a faithful transcript of the pleadings, and a material variance from them is an irregularity, *e. g.*, if a demurrer be omitted (*g*); but the Court refused to set it aside where the declaration stated the action to be at the suit of John John Shorter, and in the issue it was at the suit of John Shorter (*h*).

Delivery.

The issue cannot be delivered after notice of trial; if the former be set aside, the latter falls to the ground; neither is it regular to deliver it after nine at night.

Mode of applying, and amendment.

If the defect be in the issue, and the record be correct, the application must be directed to the former alone (*i*).

By Reg. H. T. 4 Will. IV., giving the form of the issue, it is ordered that in case of non-compliance with it, the Court or a Judge may give leave to amend; and if the defect be a mere variance from this form, and not matter of

(*f*) *Peel* v. *Ward*, 5 Dowl. 169.

(*g*) *Ferguson* v. *D'Arcy Mahon*, 2 Jurist, 820; and see *Fergusson* v. *Mitchell*, 4 Dowl. 513.

(*h*) *Shorter* v. *Helbutt*, Barnes, 476.

(*i*) *Cooze* v. *Neumegen*, 1 Dowl. 429, N. S.

substance, the party should apply to a Judge to have the issue amended, and not to the Court to have it set aside. It was so decided when the date of the writ was mis-stated, the word defendant used instead of defendants, and the award of *venire* to the *then* sheriff (*k*); and so, where made up in the old form, with a memorandum that the plaintiff brought his bill into Court, &c., the plaintiff was compelled to put it right (*l*). Plaintiff, if he discover the error, may himself apply for leave to amend it.

For an irregularity in the issue itself, the application must be made promptly (*m*), and after the trial, whether defendant appear at it or not, he cannot take advantage of it (*n*); a delay from the 13th of March to 16th of April was too late, though defendant, who was not an attorney, conducted his defence during that period in person (*o*). Time of applying.

By accepting and not returning the issue or Waiver.

(*k*) *Ikin* v. *Plevin*, 5 Dowl. 594.

(*l*) *Hart* v. *Dally*, 2 Dowl. 257.

(*m*) Within four days, according to Chit. Arch. Prac. p. 203.

(*n*) *Wilson* v. *Nesbett*, 1 Dowl. 675, N. S.; *Shepley* v. *Marsh*, 2 Stra. 1131; 1 Chit. R. 277, n.; *Mather* v. *Brinker*, 2 Wils. 243; *Shorter* v. *Helbutt*, Barnes, 476; *Seeman* v. *Allen*, 2 Wils. 160; and see *Emery* v. *Howard*, 1 Dowl. 426, N. S.

(*o*) *Currey* v. *Bowker*, 9 Dowl. 523.

paper book, defendant admits its correctness (*p*).

Variance from *Nisi Prius* record or writ of trial.

So a variance between the issue and the *Nisi Prius* record, or (what is analogous to it in trials before the sheriff) the writ of trial, is an irregularity, but it is one that may generally be waived, or that will be amended after defendant has attended and defended at the trial. We will therefore consider the decisions under two heads:—first, where a defence is made at the trial; and, secondly, where it is not. On this point there is unfortunately a conflict of judicial opinion, the Court of Common Pleas holding a defence at the trial to be no waiver, not even for the purpose of amendment; while the Courts of Exchequer and Queen's Bench hold such defence, even under protest, to operate as a waiver altogether, or certainly to render the defect amendable at the costs of the plaintiff. Thus in *Blissett* v. *Tenant* (*q*), where the date of the writ of summons was omitted in the issue, but supplied in the writ of trial, and the defendant attended under protest, the Court of Common Pleas set aside the writ of trial with costs; but in the recent case in the Exchequer, of *Cooze* v. *Neumegen* (*r*), where the facts were precisely the same, and

Waiver and amendment.

1. Where defence is made.

(*p*) See cases in n. (*n*), *ante*, p. 131.
(*q*) 6 Dowl. 436.
(*r*) 1 Dowl. 429, N. S.

where *Blissett* v. *Tenant* was cited, the rule to set it aside was discharged with costs; and by Alderson, B.—"I adhere to the decision of this Court in *Farwig* v. *Cockerton*. If a defendant wishes to take advantage of an irregularity in the proceedings, he should not appear at all at the trial, but should allow the plaintiff to go on at his peril." In *Farwig* v. *Cockerton* (*s*), on also similar facts, the Exchequer held the writ of trial amendable at any time; and *per* Parke, B.—"I think you should not have the benefit of the trial as well as of the objection. Your proper course would have been not to have appeared." And in *Hiam* v. *Smith* (*t*), where the omission of the *tam inquirendum* clause in the writ of trial, the plaintiff having given notice that he did not intend to assess damages, was holden immaterial, Lord Abinger, C. B., in reference to *Blissett* v. *Tenant*, said, "I am glad I am not a party to that decision; such cases, instead of facilitating justice, are rather opposed to it." So in *Emery* v. *Howard* (*u*), where the date of the writ of summons did not appear in the writ of trial, the award of the *venire* to the sheriff stated the debt to be above £20, the writ of trial bore no date and did not recite when and out of what Court it issued, and the issue recited

(*s*) 6 Dowl. 337.
(*t*) Id. 710.
(*u*) 1 Dowl. 426, N. S.

neither the writ of summons nor the award of the *venire*, Parke, B., discharged a rule to set aside the verdict,—defence without objection having been made,—and ordered the issue and the writ of trial to be amended, the plaintiff paying the costs of the application.

The practice of the Queen's Bench seems to agree with that of the Exchequer; for it has been decided in the former Court, that after the case on both sides has closed, the Judge had authority, which was also exercised, to supply the omission of the date of the writ of summons in the *Nisi Prius* record (*t*).

The cases decided in the Common Pleas to the contrary, have gone on the ground that the *record is altered* without leave, by not making a faithful copy of the issue into it; and Tindal, C. J., in *Blissett* v. *Tenant*, said, "I agree that if the party had merely persisted in copying the issue into the writ of trial, it would have been too late to complain of the irregularity.... The parties ought to have gone before a Judge at chambers, or to the Court, before they take the liberty of amending the record." In *Percival* v. *Connell* (*u*), where the date of the writ of summons was *mis-recited* in the writ of trial,

(*t*) *Cox* v. *Painter*, 1 W. W. & D. 228; and see *Doe* v. *Cotterell*, 1 Chit. R. 277, n.; *Thompson* v. *Simmons*, Barnes, 475; *Seeman* v. *Allen*, 2 Wils. 160.

(*u*) 6 Dowl. 68.

Tindal, C. J., suspended a rule to set aside the proceedings, so that the plaintiff might have an opportunity of moving to amend the record. However, in all the Courts, such an omission, as a material part of the plea, would probably be holden fatal; as it was, where to trespass for taking mirrors and handkerchiefs, the justification for the handkerchiefs was omitted, and the Judge refused to allow an amendment (*x*).

Where defence is not made.

If the defendant does not appear at the trial, a material variance will be ground, in all the Courts, for setting aside the proceedings (*y*). Thus, where the name of defendant was omitted in the issue, though inserted in the record (*z*); but where the plaintiff's name in the issue was James, and in the record John (which was the right name); and in the breach in the issue it was alleged "not regarding his promises," but in the record the word "not" was omitted, the Court refused to interfere (*a*). If no defence be made, the omission or mis-statement of the date of the writ of summons in the writ of trial

(*x*) *John* v. *Currie*, 6 C. & P. 618; distinguished in *Cox* v. *Painter*, 1 W. W. & D. 228.

(*y*) *Cooze* v. *Neumegen*, 1 Dowl. 429, N. S.; *Farwig* v. *Cockerton*, 6 Dowl. 337; *White* v. *Farrer*, 1 M. & W. 288.

(*z*) *Wreathcock* v. *Bingham*, Barnes, 476. But now it would probably be holden in such case that the objection should have been made to the issue before trial; see *Cooze* v. *Neumegen*, *suprà*.

(*a*) *Mather* v. *Brinker*, 2 Wils. 243.

is cause for setting aside the proceedings (*b*); but if the record agree with the pleadings delivered, a variance from the issue, (such as in the date of a bond declared upon,) is in general not material, unless it alter the defendant's plea on record (*c*), for defendant should return the issue in such case as not agreeing with the pleadings.

INQUIRY, WRIT OF.

Notice of. If notice of inquiry be omitted, or be insufficient, it is an irregularity (*d*). It must be certain as to time and place, but it is sufficient if it does not mislead defendant. It is not, it seems, irregular for being misentitled, though it may be irregular if served on defendant, instead of the attorney by whom he appeared (*e*).

Execution of. The writ must be executed against all the defendants jointly, who have suffered judgment by default, or it will be irregular (*f*).

Waiver. Any irregularity in the notice, or in the time or place of executing the inquiry, is waived by defendant, or his attorney, attending the inquiry

(*b*) *White* v. *Farrer*, 2 M. & W. 288 ; *Worthington* v. *Wigley*, 5 Dowl. 209.

(*c*) *Shepley* v. *Marsh*, 2 Stra. 1131 ; and see *Doe* v. *Cotterell*, 1 Chit. R. 277, and n. ; *Doe* v. *Wylde*, 2 B. & Ald. 472 ; *Jones* v. *Tatham*, 634.

(*d*) See "Trial, Notice of."

(*e*) *Per* Parke, B., *Roberts* v. *Cuttill*, 4 Dowl. 204.

(*f*) See *Mitchell* v. *Milbank*, 6 T. R. 199.

and making a defence on the execution of the writ (*g*). Retaining the notice is of itself no waiver (*h*); but, unless it be forthwith returned, and the objection to it stated, the party applying to set aside the inquiry will not be allowed the costs of the application (*i*).

JUDGMENT, FINAL.

See "Plea" for "Judgment by Default;" and see also "Nonpros."

Void. If plaintiff obtain a judgment, and by his own showing has no cause of action, yet, if the Court has jurisdiction of the cause, it is only an erroneous judgment; but if the Court has no jurisdiction of the cause, it is a void judgment (*k*).

Irregular. If signed too soon, judgment may be set aside as irregular (*l*); so, if too late, as after the death of defendant (*m*); or if for too much (*n*); a mere

(*g*) See "Trial, Notice of;" and *Dixon* v. *Goodman*, Barnes, 413; Id. 233.

(*h*) *Stevens* v. *Pell*, 2 Dowl. 355.

(*i*) *Id.*

(*k*) *Gold* v. *Strode*, Carth. 148; and see 10 Rep. 383; Cro. Eliz. 188; and *ante*, p. 31.

(*l*) *Doe* v. *Hedges*, 4 D. & R. 393. No rule for judgment is now necessary in any case, by Reg. T. T. 4 Vict. (1841), Q. B.; see 1 Gale & Dav. 741; and see before this new rule, 7 Dowl. 624.

(*m*) See *Harden* v. *Forsyth*, 1 A. & E. 177, N. S. And as to signing judgment *nunc pro tunc*, by leave of the Court or a Judge, see Id.; *Evans* v. *Rees*, 12 A. & E. 167; *Blackburn* v. *Godrick*, 9 Dowl. 337.

(*n*) *Chapman* v. *Hicks*, 2 Dowl. 641.

miscalculation of damages, however, which may be rejected as surplusage, does not vitiate the judgment (*o*).

A non-compliance with the rule M. 1 Will. IV. R. 10 (Excheq.), requiring delivery of a copy of the bill of costs, &c. before taxation, is no ground for setting aside the judgment and execution, but only for a review of taxation (*p*); and the objection is waived by the opposite party attending the taxation (*q*).

A judgment signed in the ordinary manner on a feigned issue, and not according to the directions of 1 & 2 Will. IV. c. 58, s. 7, will be set aside (*r*), and it appears to be a nullity (*s*). It is no objection to a judgment, that plaintiff, having had it pronounced entirely in his own favour, has entered it up partly for himself and partly for defendant (*t*). The irregularity of the judgment is no answer to an application for a rule to compute (*u*). The application to set a judgment aside for irregularity must be made promptly.

Mode of taking advantage.

Waiver.

Taxing costs and signing final judgment are considered as contemporaneous acts; and an ob-

(*o*) *Dunn* v. *Crump*, 10 Moore, 137.

(*p*) *Taylor* v. *Murray*, 3 M. & W. 141; and see *Lloyd* v. *Kent*, 5 Dowl. 125.

(*q*) *Wilson* v. *Parkins*, 5 Dowl. 461.

(*r*) *Dickinson* v. *Eyre*, 7 Dowl. 721; and see *Lambirth* v. *Barrington*, 4 Id. 126.

(*s*) 7 Dowl. 721.

(*t*) *Harnidge* v. *Wilson*, 8 Dowl. 417.

(*u*) See *Keily* v. *Villebois*, 8 Dowl. 136.

jection to its having been signed too soon, or the like, is waived by defendant's attorney attending before the Master on such taxation (*x*).

Amendment.

The judgment is amendable at common law, in substance or in form, at any time during the term of which it is signed; and at any time after it may be amended for misprision of the clerk (*y*).

NISI PRIUS RECORD AND WRIT OF TRIAL.

Writ of trial improperly adopted.

Where the sheriff has no power to try the cause under 3 & 4 Will. IV. c. 42, s. 17, the Court will set aside the proceedings, which are void; and this, at the instance of the party who obtained or consented to the writ (*z*); for consent cannot give jurisdiction where it does not exist.

(*x*) See Tidd, (9th ed.) 930; and *Wilson* v. *Parkins*, 5 Dowl. 461. But where plaintiff signed judgment on pleas, on the ground that they required a rule to plead several matters, though in fact they did not, it was set aside after defendant had attended taxation of costs. *Archer* v. *Garrard*, 6 Dowl. 132.

(*y*) See Chit. Arch. Prac. 1132, and cases there cited. So *postea* may be amended by Judge's notes, on application to the Judge by summons. *Iles* v. *Turner*, 3 Dowl. 211. And this, even after error brought. *Doe* v. *Perkins*, 3 T. R. 749.

(*z*) *Lismore* v. *Beadle*, 1 Dowl. 566, N. S.; *Wilson* v. *Thorpe*, 6 M. & W. 721; *Lawrence* v. *Wilcock*, 11 A. & E. 941; (in latter case it was without costs;) *Smith* v. *Brown*, 5 Dowl. 736; *Jacquet* v. *Bower*, 7 Dowl. 331; and see 1 Dowl. 220, N. S. A special action for breach of agreement, though the particulars claim only £7 10*s.* for wages, is not within the statute. (1 Dowl. 566, N. S., and 11 A. & E. 941; and see *Collis*

Venire facias.

Where a writ of trial commanded the recorder of a borough, to whom it was directed, to summon a jury from the county, and he tried the cause before a jury of the borough, who were not in the list of jurors for the county, it was holden, that whether the writ were regular or not, it had not been obeyed, and the proceedings were set aside (*a*); but the writ in such case should be to summon the jury from the borough, though the *venue* be laid in the county (*b*). Since 3 & 4 Will. IV. c. 67, s. 2, the *ven. fac. juratores* may be made returnable on a day certain or "forthwith" (*c*).

Part giving jurisdiction.

If that part of the writ of trial, which gives jurisdiction to the inferior Court (*d*), be omitted or curtailed, the judgment will be arrested (*e*); but where the debt was stated to be above £20, and defendant appeared at the trial, it was allowed to be amended (*f*).

v. *Groom*, 1 Dowl. 496, N. S.; 7 Dowl. 331.) Detinue is an action *ex contractu*, and if the value of the chattel be stated at not more than £20, it may be tried before the sheriff. *Walker* v. *Needham*, 1 Dowl. 220, N. S.

(*a*) *Farmer* v. *Mountford*, 1 Dowl. 46, N. S.

(*b*) *Same case*, Id. 366, N. S.

(*c*) *Drake* v. *Gough*, 1 Dowl. 573, N. S.

(*d*) *i. e.*, "and forasmuch as the sum sought to be recovered in this suit, and indorsed on the writ of summons, does not exceed £20, &c."

(*e*) *Handford* v. *Handford*, 6 Dowl. 473.

(*f*) *Emery* v. *Howard*, 1 Dowl. 426, N. S.

If the trial take place without any issue being joined, and defendant appear at the trial, the Court will award a repleader, or, to save expense, may allow an amendment on payment of costs (*g*); and after judgment and error brought, they so amended it by adding a *similiter*, where the replication traversed the facts in the plea and concluded to the country (*h*); and if an "&c." be at the end of the last pleading, the want of a *similiter* is no objection (*i*). No issue joined.

For variance between the *Nisi Prius* record or writ of trial and the issue, see "Issue." Variance.

Where the writ was directed to the Mayor of Colchester, and the trial took place before his deputy, but it was not shown that he had not the power to appoint a deputy, the Court would not set aside the proceedings (*k*). Where, on a trial before the sheriff, a verdict was taken by consent, subject to a reference, the Court set aside the verdict and judgment on the award, on the ground that the sheriff could not delegate his authority (*l*). Trial.

The cause cannot be tried after the return day of the writ (*m*), but the objection is waived Too late.

(*g*) *Wordsworth* v. *Brown*, 3 Dowl. 698.
(*h*) *Siboni* v. *Kirkman*, 6 Dowl. 98.
(*i*) *Handford* v. *Handford*, Id. 473; *Brook* v. *Finch*, Id. 313.
(*k*) *Clark* v. *Marner*, 2 Dowl. 774.
(*l*) *Wilson* v. *Thorpe*, 6 M. & W. 721.
(*m*) *Mortimer* v. *Preedy*, 3 M. & W. 602.

by defendant's appearing at the trial without protest (*n*); and where the sheriff had begun proceedings on the day on which the writ was returnable, and the case occupying the whole day, the jury retired a few minutes before twelve o'clock at night to consider their verdict, but did not return with it until after twelve, and no objection was made until after it had been given, the Court refused to set aside the return for irregularity (*o*).

Too soon.

Where the cause was tried before the time specified in the notice of trial, (at eleven instead of twelve o'clock,) and in the absence of defendant's attorney, the verdict was set aside with costs, and without an affidavit of merits (*p*).

Mode of applying.

A new trial will be granted, or judgment arrested after trial before sheriff, as in other cases; but if the objection be that the cause was not triable under the statute, the form of motion is not for a new trial, but to set aside the writ of trial and all subsequent proceedings (*q*)—for it would be absurd to ask for the cause to be sent back to the incompetent tribunal.

(*n*) *Sherman* v. *Sirsley*, 1 Jurist, 56.

(*o*) *Petier* v. *Booth*, 1 Dowl. 545, N. S. Where notice of trial has been given, which is afterwards countermanded, it is not necessary to reseal the record, unless the alteration be made to a day *after* the return of the writ. *Chandler* v. *Bezward*, 2 M. & W. 205.

(*p*) *Hanslow* v. *Wilks*, 5 Dowl. 295.

(*q*) *Walker* v. *Needham*, 1 Dowl. 220, N. S.

When defendant intends to apply after such trial, he should obtain a certificate from the sheriff, or a Judge's order to stay judgment and execution (*r*). The motion to set aside the proceedings should be supported by the production of the sheriff's notes verified by affidavit, or an affidavit stating their refusal by the sheriff, and bringing the facts before the Court (*s*). The pleadings need not be stated in the affidavit, as the writ of trial, like the *postea* in an action tried at *Nisi Prius*, is supposed to be in Court (*t*).

The party showing cause against a rule *nisi* for setting aside the proceedings, must be provided, not only with an office copy of the affidavits on which it was obtained, but also of the sheriff's notes (*u*).

NONPROS.

Too soon.

Judgment of *nonpros* is irregular, if signed too soon, as before the expiration of the four days' demand of a declaration (*x*), which demand cannot be made, so as to count for this purpose, until a term has elapsed from the time of appearance (*y*). A whole term must elapse,

(*r*) See 3 & 4 Will. IV. c. 42, s. 18.

(*s*) *Hall* v. *Middleton*, 4 N. & M. 368.

(*t*) *Milligan* v. *Thomas*, 4 Dowl. 373.

(*u*) *Walker* v. *Needham*, *supra*.

(*x*) Reg. T. T. 1 Will. IV. 2, 8.

(*y*) 13 Car. II. st. 2, c. 2, s. 3; and see *Foster* v. *Pryme*, 9 Dowl. 749.

whether the appearance were entered in term or vacation; therefore, where defendant appeared in Easter Term, judgment signed in Trinity Term was set aside (*z*). So plaintiff can never be *nonprossed* until defendant himself has appeared (*a*); it is not sufficient that plaintiff has appeared for him. If the action be against several defendants, unless all have appeared, plaintiff cannot be *nonprossed* by any (*b*), unless he has actually declared against some, or taken out a rule for time to declare against some; in which case the others, who have appeared, may *nonpros* him (*c*). During an order obtained by defendant, which operates as a stay of plaintiff's proceedings, such as an order for particulars, it is irregular to sign judgment of *nonpros* (*d*). Where ten days were given to reply on the 24th of March, and the five following days were holidays, judgment signed for want of a replication on the 8th of April, was not too soon (*e*).

Too late.

So if signed too late, as after a year from the service of the writ, when the cause is out of

(*z*) *Foster* v. *Pryme*, 8 M. & W. 664; 9 Dowl. 749, *S. C.*; and see Lush's Prac. p. 336; and Tidd's New Prac. 224.

(*a*) *Hall* v. *Champneys*, 4 Dowl. 713.

(*b*) *Powell* v. *White*, 1 Doug. 169; *Palmer* v. *Feistel*, 2 Dowl. 507; and see Chit. Arch. Prac. p. 1052.

(*c*) *Roe* v. *Cock*, 2 T. R. 257; Id. 259, n.

(*d*) *Burgess* v. *Swayne*, 7 B. & C. 485; *Kirby* v. *Snowden*, 4 Dowl. 191; and see 6 Dowl. 693.

(*e*) *Liffin* v. *Pitcher*, B. C. E. T. 1842, 6 Jurist, 537.

Court (*f*), or at any time after declaration has been actually delivered (*g*), unless its delivery were a fraud on the Court (*h*).

Where plea a nullity.

Where the plea is a nullity, and not merely irregular, no judgment of *nonpros* can be signed for not replying to it (*i*).

Setting aside the judgment.

If the judgment of *nonpros* be irregularly signed, it will be set aside with costs; and if an action or other proceedings be had upon such judgment, one rule is sufficient, and one alone should be moved for, to set aside such proceedings, as well as the judgment (*k*).

NOTICE OF TRIAL.—See TRIAL.

NOTICE TO PLEAD.—See PLEA.

ORDER FOR ARREST.—(See AFFIDAVIT TO HOLD TO BAIL, CAPIAS, ARREST.)

Application for.

The application for an order under 1 & 2 Vict. c. 110, s. 3, to hold to bail, must be made to a Judge, and not to the full Court (*l*).

For detainer on condition.

Where a defendant was discharged under 1 & 2 Vict. c. 110, s. 7, on entering a common appearance, and a Judge was applied to, to detain

(*f*) Reg. H. T. 2 Will. IV. R. 35; *Cooper* v. *Nias*, 3 B. & Ald. 271.

(*g*) *Gray* v. *Pennell*, 1 Dowl. 120.

(*h*) *Ariel* v. *Barrow*, 8 Bing. 375.

(*i*) *Garratt* v. *Hooper*, 1 Dowl. 28; Barnes, 252.

(*k*) *Barlow* v. *Kaye*, 4 T. R. 638; and see 1 Chit. R. 142 and *ante*, "Bail," p. 87.

(*l*) *Bentley* v. *Berry*, 7 M. & W. 146.

him under s. 3, and the Judge ordered he should be detained till he gave bail, or *till further order*, the order was set aside as invalid, on account of such condition being annexed, and the defendant was discharged (*m*).

Setting aside.

If the affidavits, on which the order was obtained, were insufficient, apply to set aside the order, not the *capias* (*n*).

OUTLAWRY.

If the proceedings to outlawry be in any respect irregular, the Court or a Judge will set aside the judgment of outlawry, in general without imposing any terms, and with costs (*o*). And they will summarily interfere for an outlaw, even though the defect be ground of error.

Who to apply.

No third person can take advantage of any defect in the proceedings (*p*). Where one of two defendants having been outlawed, the plaintiff declared against the other, stating the outlawry, the latter applied to set aside the declaration, because the outlawry was irregular, but the rule was discharged (*q*).

(*m*) *Boddington* v. *Woodley*, 8 A. & E. 925.

(*n*) *Hopkinson* v. *Salembier*, 7 Dowl. 493.

(*o*) *Vere* v. *Gowar*, 4 Scott, 287. In other cases than for irregularity, the outlaw must pay the costs, except where the outlawry has been clearly vexatious. *The Bank of England* v. *Reid*, 1 Wol. P. C. 59.

(*p*) *Symonds* v. *Parmiter*, 1 W. Bla. 20.

(*q*) *Solley* v. *Forbes*, 2 Moore, 90.

The outlaw must apply promptly. Where the writ was filed on the 4th of June, and might have been seen at any time afterwards by the defendant at the office, he was holden too late in Michaelmas Term, though he swore that he never knew of the outlawry until six weeks before (*r*); so where the outlawry was completed in August, an application in Michaelmas Term was too late (*s*). When to apply.

PLEA.—(See ABATEMENT, PLEA IN.)

If no plea, or, which is the same thing, if a null plea, be pleaded within the limited period, plaintiff may sign judgment as for want of a plea at the expiration of that period.

1. An affirmative plea which clearly presents a fictitious defence, and which is evidently put in for delay, or which is utterly insensible and absurd, affording no shadow of defence, is a nullity (*t*). What pleas are nullities. Affirmative plea, when.

Thus, where to an action on a bill of exchange, defendant pleaded a judgment recovered on a day *prior to that* on which the bill was alleged to have been drawn, it was holden that

(*r*) *Lewis* v. *Davison*, 3 Dowl. 272.

(*s*) *Anderson* v. *Alexander*, 2 Dowl. 267.

(*t*) See Lush's Prac. p. 399, where many of these rules will be found ably deduced and supported.

judgment was properly signed (*u*). And so, where to trespass for turning plaintiff out of his house, and seizing his goods, it was pleaded that plaintiff had not, *at the time of suing out the writ*, nor since, anything in the house, or goods, but jointly with one of the defendants (*x*).

But in such cases, unless the inference be irresistible, the plaintiff is not at liberty to take upon himself to pronounce that the plea is a nullity (*y*). The inference must be strong and pregnant, and almost irresistible, before the Court itself will pronounce a plea to be a sham plea (*z*); and if there be any doubt, the plaintiff should apply to the Court for leave to sign judgment, or to strike out the plea on an affidavit, negativing the alleged defence (*a*).

Negative plea, when.

2. A negative plea taking issue on a matter not alleged, nor in any way involved in the declaration, or not in any manner adapted to the nature of the action, is a nullity. Such is *non*

(*u*) *Phillips* v. *Bruce*, 6 M. & S. 134; and see *Lamb* v. *Pratt*, 1 Dowl. & Ryl. 577, S. P.

(*x*) *Hopgood* v. *Wright*, 2 N. R. 188; and see *Murray* v. *Hubbart*, 1 B. & P. 645; *Gray* v. *Sidneff*, 3 Id. 395; *Thomas* v. *Smithies*, 4 Taunt. 688; *Thellusson* v. *Smith*, 5 T. R. 152; and see 1 East, 372; *Anon.*, 1 Chit. R. 355, n. (*a*); Id. 564 (*a*).

(*y*) *Per Curiam*, in *Bell* v. *Alexander*, 6 M. & S. 134.

(*z*) *Phillips* v. *Bruce*, Id. 136.

(*a*) *Id.*; and see *Blewitt* v. *Marsden*, 10 East, 237.

assumpsit to trover (*b*), or to debt (*c*), and it is said, *nunquam indebitatus* to a *special assumpsit* (*d*); but as on this last point there are cases which lean to the contrary (*e*), it will be safer to apply for leave to sign judgment.

But if the matter denied, go to the *substance* of the action, though it be not alleged in the declaration, or though the traverse be otherwise informal, plaintiff can only demur or move to set the plea aside. Thus, not guilty to *assumpsit* (*f*), *nunquam indeb.* to the *common* counts in *assumpsit* (*g*), or to debt on bond (*h*), or on a judgment (*i*), and *non assumpsit* in an action of *tort* against a carrier (*k*), are pleas which would

(*b*) *Bent* v. *Benyon*, 6 C. & P. 217.

(*c*) *Brennan* v. *Egan*, 4 Taunt. 164; *King* v. *Myers*, 5 Dowl. 686; *Perry* v. *Fisher*, 6 East, 549.

(*d*) *Stafford* v. *Little*, Barnes, 257; where the action was on a promissory note; and see Lush's Prac. p. 399.

(*e*) These cases were decided on the plea of *nil debet*; *Bailey* v. *Edwards*, Cas. temp. Hardw. 179; *Brennan* v. *Egan*, 4 Taunt. 165, *per* Lord Mansfield, C. J.; and see also Lawes on Pleading, p. 529; Tidd, (9th ed.) 563; 1 Chit. R. 716, n.

(*f*) *Aaron* v. *Chaundy*, 2 B. & C. 562, distinguished in *King* v. *Myers*, 5 Dowl. 686; see also *Marsham* v. *Gibbs*, 2 Stra. 1022; *Coggs* v. *Bernard*, Salk. 26, 773; *Robinson* v. *Green*, 1 Stra. 574; *Corbyn* v. *Brown*, Cro. Eliz. 470. *Assumpsit* is a species of action on the case.

(*g*) *Brennan* v. *Egan*, 4 Taunt. 164.

(*h*) *Rawlins* v. *Danvers*, 5 Esp. 38.

(*i*) *Anon.*, 2 Chit. R. 239.

(*k*) *Robinson* v. *Green*, 1 Stra. 574; and *per Curiam*, "The undertaking to carry is the gist of the action . . . In the case

be good on general demurrer (*l*), and therefore go too closely to the merits of the case to be treated as nullities. So *nil debet*, or *non assumpsit* to a bill of exchange, though contrary to the new pleading rules, is not a nullity (*m*), but plaintiff should demur or apply to strike it out. Where to an action on a bill of exchange against an indorsee, he pleaded that he did not *draw* the bill, it was holden not to be a nullity (*n*); and *per Curiam*—"This is merely an argumentative denial of the fact of indorsement. Every indorser is in contemplation of law a new drawer. The objection should have been taken advantage of by special demurrer." Neither can plaintiff sign judgment, if to an action on a promissory note, defendant pleads "he did not undertake," omitting the word promise (*o*).

of a tort founded on an agreement *non assumpsit* will be sufficient, because it tries the merits as much as not guilty could have done." See also *Hayne* v. *Anon.*, 1 Chit. R. 716, n. Not guilty to debt on a penal statute it seems is good; see *Coppin* v. *Carter*, 1 T. R. 462; and Id. n. (*b*).

(*l*) It seems a good test to inquire whether the pleas would be good on general demurrer, or after verdict? If they would, they certainly cannot be treated as nullities, though it does not follow that such as are bad on general demurrer may always be treated as nullities. In *Robinson* v. *Green*, *suprà*, (*k*), it was moved in arrest of judgment.

(*m*) *Finleyson* v. *M'Kenzie*, 3 Bing. N. C. 824; *Hay* v. *Fisher*, 2 M. & W. 732.

(*n*) *Allen* v. *Walker*, 5 Dowl. 460.

(*o*) *Smith* v. *Jones*, 3 D. & R. 621.

3. An instrument not partaking of any of the formalities of a plea, as "defendants say they are not guilty" (*p*),—"general issue—*non assumpsit*" (*q*); "I plead—*nil debet*—yours, &c." (*r*), or "defendant puts himself upon the country" (*s*), may be treated as a nullity; but not so if the plea merely be not confined to the count to which alone it applies (*t*). Instrument without any of the formalities of pleas.

4. If a plea requiring counsel's signature be delivered without it, it may be treated as a nullity (*u*); and it is now decided on the same prin- Signature of counsel.

(*p*) *Albany* v. *Griffin*, Cas. Prac. C. P. 126.

(*q*) *Gibson* v. *Houseman*, 1 Chit. R. 647, n.

(*r*) *Martyn* v. *Skinner*, Barnes, 239.

(*s*) *Hockley* v. *Sutton*, 2 Dowl. 700.

(*t*) *Vere* v. *Goldsborough*, 1 Bing. N. C. 353; and see *Putney* v. *Swan*, 5 Dowl. 296; *Jourdain* v. *Johnson*, 2 C. M. & R. 564.

(*u*) R. E. 18 Car. II. K. B.; *Shield* v. *Twigg*, 9 Dowl. 751; *Leigh* v. *Monteiro*, 6 T. R. 496. So where signature was indorsed, *Grant* v. *Anon.*, 2 Chit. R. 319. But it is said to have been decided by Patteson, J., at chambers, that if indorsed, plaintiff cannot sign judgment; *Colyer* v. *Billett*, Nov. 1836; cited in Chit. Arch. Prac. p. 171. The signature may either be on the draft, and copied on to the engrossment, or be originally on the engrossment; *Salter* v. *Ponsford*, 8 Dowl. 435; *Power* v. *Fry*, 3 Dowl. 140. Where judgment was signed because the plea had been signed by a barrister's *clerk*, Parke, B., refused to set the judgment aside; (at chambers, cited in *Salter* v. *Ponsford*, *suprà*.) If defendant conduct his defence in person, the pleas must still be signed; *Samuels* v. *Dunne*, 3 Taunt. 386. While the Court of Common Pleas was open to the bar, pleas there pleaded might have been signed by any

ciple that applies to non-issuable pleas, that if a special plea requiring counsel's signature be delivered without it, the plaintiff may sign judgment as to the whole, notwithstanding there are other pleas which do not require signature, and going to the whole of the declaration (*x*); *à fortiori* may he sign judgment for the whole, where the plea not requiring signature goes only to part (*y*); but if two defendants sever in their pleas, and one plead the general issue, and the other a special plea unsigned, plaintiff can take judgment only against the latter (*z*).

Non-issuable plea.

5. If defendant be under terms to plead issuably, and deliver a non-issuable plea, plaintiff may sign judgment (*a*). And if it be a sham or false plea, the Courts will more readily allow it to be treated as a nullity, than when defendant

barrister; *Power* v. *Fry*, 3 Dowl. 140; but since the Serjeant's case, 6 Bing. N. C. 235, it seems they should be signed by a serjeant. It was decided in *Bodenham* v. *Hill*, 7 M. & W. 274, that the plea of the Statute of Limitations, *non assumpsit infrà sex annos*, need not conclude with a verification; but it has since been decided, that notwithstanding such decision, it must be signed by counsel; *Roberts* v. *Howard*, 1 Dowl. 667, N. S. The common plea of defendant's bankruptcy need not be signed, as it concludes to the country.

(*x*) *Shield* v. *Twigg*, 9 Dowl. 751.

(*y*) *Macher* v. *Billing*, 3 Dowl. 246; and see remarks on *Spencer* v. *Cartlick*, Id. 247, n.

(*z*) Sellon's Prac. 295; 2 Lil. Reg. 299.

(*a*) *Myers* v. *Lazarus*, 1 Dowl. 316, N. S.; *Waterfall* v. *Globe*, 3 T. R. 305; *Searle* v. *Bradshaw*, 2 Dowl. 289.

is not under terms. To debt on bond against A. and B., A. being under terms, pleaded that plaintiff ought not further to maintain his action, because defendants were in partnership, and after the commencement of the suit, in consideration of plaintiff's agreeing to forbear all proceedings, they agreed to dissolve partnership, and it was dissolved accordingly; plaintiff signed judgment, and a rule to set it aside was discharged with costs (*b*), the plea setting up a parol agreement in answer to a specialty. And where defendant was under terms, and pleaded *nunq. indeb.* to the whole declaration in debt, containing counts on bills of exchange, plaintiff was held justified in signing judgment (*c*). But unless it appear on the face to be a dilatory plea, if it go to the substance of the action, though informally pleaded, *e. g.*, a justification for slander not strictly amounting to a justification, it can only be demurred to (*d*). Under terms of pleading issuably, defendant can put in only a plea that goes to the merits (*e*), such

(*b*) *Blackburn* v. *Edwards*, 10 A. & E. 21.

(*c*) *Sewell* v. *Dale*, 8 Dowl. 309; which he would not have been, unless defendant had been under terms, *ante*, p. 150.

(*d*) *Thellusson* v. *Smith*, 5 T. R. 152.

(*e*) *Simeon* v. *Thompson*, 8 T. R. 71; where see remarks of Lord Kenyon, C. J.; *Humphreys* v. *Earl of Waldegrave*, 8 Dowl. 768; see also *Barker* v. *Gleadow*, 5 Dowl. 134; *Staples* v. *Holdsworth*, 4 Bing. N. C. 144.

as a plea in bar, or a general demurrer affecting the substance of the plaintiff's demand (*f*).

As in the case of unsigned pleas, one plea not being issuable will vitiate the rest (*g*); and by the same analogy this rule will prevail, it seems, whether the non-issuable plea go to the whole or part of the action.

Several pleas without a rule.

6. "If a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign

(*f*) 7 T. R. 530. Not a special demurrer; 1 East, 411. But defendant may demur specially for good cause to the *replication*; *Barker* v. *Gleadow*, *suprà*. Defendant under terms cannot plead any dilatory plea, 1 Burr. 59; nor a palpably false one. A plea to an action on an attorney's bill, that no signed bill was delivered, 2 C. & M. 340; or that plaintiff was uncertificated, 1 Gale, 59; or (in other cases) bankruptcy, or insolvency of one of several plaintiffs, after commencement of suit, 4 Bing. N. C. 144; 6 Dowl. 746, *S. C.*; (but *contrà*, bankruptcy of a sole plaintiff before action, see 5 Bing. N. C. 465; 9 Dowl. 278; 7 Scott, 475;) *plenè administravit*, and defendant's bankruptcy in an action against an administrator, 2 Dowl. 289; and it seems coverture, 2 W. Bla. 724; are not issuable. But tender, Statute of Limitations, infancy, bankruptcy of defendant, Tippling Act, 23 Hen. III. c. 10, to an action on a bail-bond, or no *ca. sa.* against principal, are issuable. See Chit. Arch. Prac. p. 162; Lush's Prac. p. 394; and *Parratt* v. *Goddard*, 11 Law Journ. 217, N. S., Exch.; *Lloyd* v. *Blackburn*, Id. 210, Exch.; 8 Dowl. 768; *Blewitt* v. *Gordon*, 1 Dowl. 815, N. S.; *Watkins* v. *Benevsan*, 1 Dowl. 615, N. S.

(*g*) *Waterfall* v. *Globe*, 3 T. R. 305; *Cuming* v. *Sharland*, 1 East, 411.

judgment" (*h*). If the several pleas, however, taken together amount but to one defence, as if one plea be to one part of the declaration and one to another, no rule to plead several matters is necessary (*i*); and plaintiff having signed judgment on such pleas, the Court set it aside, even though defendant had attended the taxation of costs (*k*). So, it seems, no rule is required for pleas added under a Judge's order (*l*). To a declaration on a bill of exchange, defendant pleaded, without a rule to plead several matters or signature of counsel, to the first count payment, and also that he did not promise, and to the other counts that he put himself upon the country. Held plaintiff was justified in treating them as separate pleas and signing judgment, though the second was inadmissible by the new rules, and the last put nothing in issue; and though no rule to plead the two last could have been obtained (*m*). If the rule be taken

(*h*) Reg. H. T. 2 Will. IV. R. 1, s. 24. But not so, if by mistake defendant plead different pleas from those for which the rule was obtained. *Holliday* v. *Bohn*, 3 Scott, N. R. 496.

(*i*) *Archer* v. *Garrard*, 6 Dowl. 132; *Macher* v. *Billing*, 3 Dowl. 247; *Vere* v. *Goldsborough*, 1 Bing. N. C. 353.

(*k*) *Archer* v. *Garrard*, *suprà*; and, *ante*, "Judgment," p. 139.

(*l*) *Monck* v. *Shenstone*, 3 Scott, 661; and see *Smith* v. *Goldsworthy*, 11 Law Journ. 151, N. S., Q. B.

(*m*) *Hockley* v. *Sutton*, 2 Dowl. 700; and see *Booth* v. *Whitehead*, 8 Dowl. 8.

out in a wrong Court, or the names be misstated, it is null; but where, in a cause of "A. *v.* B. and another," the rule was entitled "A. *v.* B." and judgment signed, the Court set it aside without costs (*n*).

Plea before declaration taken out of office, or before appearance.

7. Where the declaration is filed and defendant pleads before he takes it out of the office, plaintiff may treat the plea as a nullity (*o*). Where the declaration was filed on the 24th, with notice to plead in four days, and the four days succeeding were holidays, judgment signed on the 29th was set aside (*p*). So if defendant plead before appearance, it is a nullity (*q*).

Plea delivered in the country.

8. If the plea be filed or be delivered in the country, instead of being delivered to the town agent, plaintiff may sign judgment (*r*).

Setting forth in part or falsely on oyer.

9. If defendant, after craving oyer, sets forth part only of the condition of a bond, or sets forth the matter falsely, plaintiff may sign judgment on the whole declaration (*s*).

Judgment recovered.

10. A plea of judgment recovered in another

(*n*) *Christie* v. *Walker*, 1 Bing. 187.

(*o*) *Keeling* v. *Newton*, 1 Wils. 173; *Bond* v. *Smart*, 1 Chit. R. 735.

(*p*) *Wheeler* v. *Green*, 7 Dowl. 194.

(*q*) *Wakefield* v. *Marden*, 2 Chit. R. 7; *Cook* v. *Raven*, 1 T. R. 635; *Venn* v. *Calvert*, 4 Id. 578.

(*r*) *Taylor* v. *Lawson*, Cas. Pr. C. P. 123; and see *Elwood* v. *Elwood*, Id. 124; *Rowsell* v. *Cox*, 1 Chit. R. 211.

(*s*) *Wallace* v. *Duchess of Cumberland*, 4 T. R. 370; see 3 D. & R. 86, n. (*a*).

Court, without having in the margin of such plea the date of the judgment, and if the judgment be in a Court of record, the number of the roll on which such proceedings are entered, if any, entitles plaintiff to sign judgment; and in case the same be falsely stated by defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court, where such judgment is alleged to have been recovered, that there is no such record or entry of judgment as therein stated, shall be at liberty to sign judgment *by leave* of the Court or a Judge (*t*). If the marginal note under the former branch of this rule be omitted, plaintiff should himself sign judgment without application to the Court (*u*). The rule applies only to the well known sham plea of judgment recovered, and it was held not to apply, where to *assumpsit* for money lent, defendant pleaded that in a former action the now plaintiff set off the same debt, and in that action the now defendant gained a verdict (*x*). Neither does it apply to a plea of judgment recovered by an executor, which is in effect only *plenè administravit* (*y*).

(*t*) Reg. H. T. 4 Will. IV. R. 8.
(*u*) *Per* Parke, B., *Begbie* v. *Grenville*, 3 Dowl. 503.
(*x*) *Brokenshir* v. *Monger*, 9 M. & W. 111.
(*y*) *Power* v. *Fry*, 3 Dowl. 140.

11. There are certain formalities, collateral to the plea itself, but which are deemed so essential in law, that their omission renders the plea a nullity. Thus if a tender be pleaded without payment of the money into Court, plaintiff may sign judgment for so much as the plea applies to, but no more (*a*); so if a plea of payment of money into Court be delivered without the receipt of the officer of the Court on the margin (*b*); and a dilatory plea pleaded without an affidavit of verification is a nullity (*c*); and so it is, when the affidavit annexed is null in itself. —See "Abatement."

Tender.

Payment into Court.

Dilatory plea.

12. Where the defendant, after pleading a plea in abatement, without applying to the Court for leave to withdraw it, pleaded a sham plea of judgment recovered, the Court allowed plaintiff to sign judgment (*d*); and so where two pleas were delivered on the same day, and plaintiff swore he had been misled by them (*e*).

Withdrawal of plea without leave.

13. A plea delivered between the 10th of August and the 24th of October, is a mere nullity (*f*), and plaintiff should sign judgment;

Plea delivered between 10th August and 24th October.

(*a*) *Pether* v. *Shelton*, 1 Stra. 638; *Bray* v. *Booth*, Barnes, 252; *Chapman* v. *Hicks*, 2 Dowl. 641.

(*b*) Chit. Arch. Prac. p. 973.

(*c*) See "Abatement."

(*d*) *Palmer* v. *Dixon*, 5 D. & R. 623; and see Reg. H. T. 2 Will. IV. R. 46; Tidd's Prac. (9th ed.) p. 413.

(*e*) *Samuels* v. *Dunne*, 3 Taunt. 386.

(*f*) *Mills* v. *Brown*, 9 Dowl. 151; 1 Wol. 14, *S. C.*;

but in one case *where he applied for leave to do so*, Coleridge, J., discharged the rule, holding that he should have applied within four days from the expiration of the time to plead (*g*).

Plea, a fraud on Judge's order.

14. A plea which is a fraud on a Judge's order is a nullity (*h*): thus where defendant had obtained an order for stay of proceedings upon paying the debt and costs which had been taxed, and afterwards having abandoned the order, he pleaded a judgment recovered, the Court discharged with costs, a rule to set aside the judgment signed in consequence (*i*).

Plea, professing to answer part.

15. If the plea profess to answer part of the declaration and does answer only part, plaintiff should sign judgment for the part unanswered, or there will be a discontinuance; but if the plea purport to answer the whole and answers only part, he should demur, or if pleaded manifestly for delay, he may apply to the Court or a Judge to order defendant to amend or to set aside the plea (*k*).

Incidents to

Where defendant pleaded a nullity, and signed

and see 2 Will. IV. c. 39, s. 11; Reg. M. T. 3 Will. IV. R. 12.

(*g*) *Mills* v. *Brown*, *suprà*.

(*h*) *Hill* v. *Dyball*, 2 Chit. R. 292.

(*i*) *Id.*

(*k*) *Wood* v. *Farr*, 7 Dowl. 263; 1 Salk. 179; 1 Chit. Pl. 523; Steph. Pl. 242; Lush's Prac. 401. In an action against husband and wife, a plea by the husband alone is, it seems, a nullity; *Russell* v. *Buchanan*, 6 Price, 139.

signing judgment. judgment of *nonpros* because plaintiff did not reply, and plaintiff then signed judgment on the plea, the plaintiff's proceedings were holden regular (*l*). If plaintiff amends his declaration with liberty to defendant to plead *de novo*, the former plea, if applicable to the amended declaration, will stand, unless he plead *de novo*, and therefore judgment signed under such circumstances, because no fresh plea is pleaded, will be set aside (*m*). Though a nullity cannot be waived, yet if plaintiff in any way recognizes the validity of a null plea, as taking out a summons for particulars of set-off, &c., he will not, it seems, be allowed himself to sign judgment upon it (*n*).

Irregularities in pleas. Any defects short of the above are irregularities merely, or at most, specially demurrable; and among such are the following :—

Names. The mis-statement of the names of either party, or the character in which they appear (*o*), or a

Date. mistake in the date of the plea (*p*); the delivery

(*l*) *Bray* v. *Booth*, Barnes, 252.

(*m*) *Fagg* v. *Borsley*, 1 C. & M. 770.

(*n*) *Brokenshir* v. *Monger*, 9 M. & W. 111. Where plaintiff does not sign judgment, but goes to trial, if the plea be altogether a nullity, and totally unavailable as a defence, judgment *non obstante veredicto* may be given, but never so if plea be merely irregular; see 6 Dowl. 487.

(*o*) *Dale* v. *Beer*, 7 East, 333; *Barker* v. *Hartley*, Cas. Prac. C. P. 49; *Anon.*, 7 D. & R. 511.

(*p*) *Hodson* v. *Pamel*, 7 Dowl. 208; and see *Dakins* v. *Wagner*, 3 Dowl. 535.

of the plea by a new attorney without an order for change (*q*), or by an uncertificated attorney, or one off the rolls (*r*). So where the matter pleaded *puis darrein continuance* was in *esse* at the time of the first plea (*s*); or if the plea be delivered after 9 o'clock at night (*t*). Attorney.

So if the plea be available in any way, as where it alleges money to have been paid into *Court before* declaration (*u*), the plaintiff may not treat it as a nullity; nor in any case can he do so where the plea may be rendered good by rejecting the defective part as surplusage (*x*).

It is not irregular to enter appearance in the name of the town agent as "attorney for defendant," and to deliver plea in the name of the country attorney, but with the same agent's name indorsed (*y*); or to plead by attorney after having appeared in person (*z*). What no irregularity.

If the plea be evidently a nullity, plaintiff should, at the proper time, sign judgment, unless it be one of those cases where he is directed Mode of proceeding.

(*q*) *Doe* v. *Bransom*, 6 Dowl. 490.

(*r*) *Bayley* v. *Thompson*, 2 C. & M. 673; *Hill* v. *Mills*, 2 Dowl. 696.

(*s*) Andr. 328; Say. 268; Lush, Prac. p. 417, (*x*).

(*t*) *Horsley* v. *Purdon*, 2 Dowl. 228.

(*u*) *Edwards* v. *Price*, 6 Dowl. 487.

(*x*) *Risdale* v. *Kelly*, 1 Dowl. 285. In cases of surplusage, the proper course is to apply to strike out superfluous matter; see 5 Dowl. 294; 1 D. & R. 473.

(*y*) *Buckler* v. *Rawlins*, 3 B. & P. 111.

(*z*) *Kerrison* v. *Wallingborough*, 5 Dowl. 564.

to apply to the Court or a Judge in the first instance. If he so applies, when he is entitled himself to treat it as a nullity, sometimes the costs will not be allowed to him, though the judgment, if regularly signed, is seldom set aside, except on payment of costs; and we have seen, in one case, Mr. Justice Coleridge refused leave to sign judgment on a nullity, on the ground of the application being too late (*a*); showing that the Court will not exert its summary jurisdiction where delay has taken place, though the applicant himself might have taken the step for which he applies. Where there is any, the slightest, doubt as to its being a nullity, plaintiff should certainly apply for leave, and not take upon himself to pronounce it void (*b*).

The application in general is to set aside the pleas, and for leave to sign judgment; but if pleaded under a rule to plead several matters, or under a Judge's order, though plaintiff by consenting to such rule or order is not concluded by it from objecting to the irregularity of the pleas (*c*), yet the application should be to discharge or rescind the rule or order (*d*).

(*a*) See *Mills* v. *Brown*, 9 Dowl. 151.

(*b*) See *Cowper* v. *Jones*, 4 Dowl. 591; *Horner* v. *Keppel*, 10 A. & E. 17.

(*c*) *Humphreys* v. *The Earl of Waldegrave*, 8 Dowl. 768.

(*d*) *South Eastern Railway Co.* v. *Sprot*, 11 A. & E. 167; *Howen* v. *Carr*, 5 Dowl. 305; and see *Fowell* v. *Petre*, 5 A. & E. 822.

If the objection be, that the plea is false and pleaded for the purpose of delay, an affidavit of that fact will be required; but such affidavit has been dispensed with, where the plea was frivolous on the face of it (*e*). In one case it was doubted whether the Courts had power to set aside bad pleas (*f*); but this doctrine has been subsequently repudiated (*g*).

What pleas will be set aside.

Where a plea is clearly frivolous or sham on the face of it, or rambling, sham, and offering several answers without a rule to plead several matters, or contrary to a rule of Court, or wholly inapplicable to the cause of action, or clearly bad on the face and false in fact, the Courts will set it aside, and, as a consequence, plaintiff at proper time may then sign judgment (*h*).

If the affidavit verifying a plea in abatement for the non-joinder of a party as co-defendant, omit his actual residence at the time of making the affidavit, the Court will set it aside (*i*).

What pleas not set aside.

Where it is doubtful whether notice of declaration has been served, plaintiff must sign judg-

(*e*) *Balmanno* v. *Thompson*, 6 Bing. N. C. 155; *Blewitt* v. *Marsden*, 10 East, 237; *Bradbury* v. *Emans*, 5 M. & W. 595.

(*f*) *Cowper* v. *Jones*, 4 Dowl. 591.

(*g*) *Horner* v. *Keppel*, 10 A. & E. 17.

(*h*) See *Horner* v. *Keppel*, *suprà*; *Balmanno* v. *Thompson*, *Bradbury* v. *Emans*, *suprà*; *Knowles* v. *Burward*, 10 A. & E. 19.

(*i*) *Wheatley* v. *Golney*, 9 Dowl. 1019.

ment at his peril, and the Court will not assist him by giving leave to do so (*k*). A plea will not be set aside, merely because it commences with a formal defence, as "he comes and defends the wrong," &c., instead of the form prescribed by the New Rules, H. T. 4 Will. IV. R. 10 (*l*); and where in an action by indorsee against acceptor, defendant pleaded that he had no notice of indorsement, that he did not promise to pay, and that plaintiff had not paid the whole consideration, the Court refused to set aside the pleas on motion (*m*); and *per* Littledale, J.—"Here the plea traverses allegations in the declaration, which are found in the forms prescribed by a rule of the Court."

When to apply.

We have seen, that Mr. Justice Coleridge, on application being made to him to set aside a plea, limited the period to four days after expiration of time to plead (*n*).

Curing a nullity and waiving an irregularity in plea.

A null plea, perhaps, might be cured in some cases, by replying to it, as even matter of general demurrer may be, where the next pleading *expressly* supplies the omission (*o*). If the plain-

(*k*) *Spriggins* v. *White*, 9 Dowl. 1000.

(*l*) *Bacon* v. *Ashton*, 5 Dowl. 94. An informal conclusion to the country, instead of by verification, is ground for special demurrer. *Smith* v. *Smith*, 5 Dowl. 84.

(*m*) *Horner* v. *Keppel*, 10 A. & E. 17.

(*n*) *Mills* v. *Brown*, 9 Dowl. 151.

(*o*) *Ante*, p. 8.

tiff treat the plea as a nullity, he does so for all purposes, and he cannot afterwards contend that it performed the office of an irregular plea in waiving a demand of a plea (*p*).

An irregular plea is waived by keeping it (*q*).

When judgment is to be signed.

Pleading a nullity is not a dispensation of the remaining time, so as to entitle plaintiff to sign judgment at once, for defendant may yet deliver a proper plea (*r*); and though it may have been differently decided as to pleas in abatement on the ground of defendant being bound by his election, and no favour being shown to such pleas (*s*), yet as by leave of the Court or a Judge he may withdraw even this plea and plead in bar (*t*), the same rule will probably prevail, as in the case of pleas in bar, and it will be safer to wait until the expiration of the period for pleading in bar. If judgment be signed on the morning after the time for pleading has expired, and while the

(*p*) *Hough* v. *Bond*, 1 M. & W. 314.

(*q*) *Margerem* v. *Makitwaine*, 2 N. R. 509.

(*r*) *Macher* v. *Billing*, 3 Dowl. 246, and cases in note; *Dakins* v. *Wagner*, Id. 535; *Nollekin* v. *Severn*, 2 C. & J. 333; *Smith* v. *Rathbone*, 5 Dowl. 401; *Pepperell* v. *Burrell*, 1 C. M. & R. 372; *Warne* v. *Beresford*, 4 Dowl. 361.

(*s*) *Brandon* v. *Payne*, 1 T. R. 689; *Richards* v. *Setree*, 3 Price, 197; *Nollekin* v. *Severn*, *supra*; and see note to 3 Dowl. 250.

(*t*) See *Palmer* v. *Dixon*, 5 D. & R. 623; and Reg. H. T. 2 Will. IV. R. 46.

parties are attending a Judge at chambers on a summons for time to plead, returnable before the judgment is actually signed, it is irregular (*u*). It is now decided, that if the time for pleading expire *on* the 10th of August, defendant has the same number of days for pleading, after the 24th of October, as if the declaration had been delivered on that day; but if the time expire *before* the 10th of August, judgment may be signed at any time, whether during the period between the 10th of August and 24th of October, or not (*x*). If it be time enlarged by a Judge's order, and it expire after or on the 10th of August, the defendant, it seems, is entitled to as many days after the 24th of October, as, added to the number which had expired on the 10th of August, make up the time (*y*).

If defendant be not prepared to plead and make his summons for time returnable *after* the judgment office opens, it is no stay, and plaintiff may sign judgment at the expiration of the limited time (*z*); but *after* a plea is actually delivered, though the time may have expired be-

(*u*) *Abernethy* v. *Paton*, 6 Scott, 586.

(*x*) *Morris* v. *Hancock*, 1 Dowl. 320, N. S.

(*y*) *Trinder* v. *Smedley*, 3 Dowl. 87; *Wills* v. *Brown*, 1 Wol. 14; *Le Fevre* v. *Molineux*, 6 Dowl. 153; see *Wilson* v. *Bradslocke*, 2 Dowl. 416.

(*z*) *Barnett* v. *Newton*, 1 Chit. R. 689.

fore the delivery, judgment cannot be signed (*a*). Judgment signed on a *dies non* is irregular (*b*).

Setting aside irregular judgment.

As irregularity in the judgment cannot be shown as cause against a rule *nisi* to compute, the only course in such case is to obtain a cross rule to set aside the judgment, and to arrange that both rules shall come on together (*c*).

Time for setting aside irregular judgment.

As a general rule, the application to set aside an irregular judgment should be made, at the latest, within eight days after the means of knowing of the irregularity (*d*). Where judgment for want of a plea was signed on the 17th of April, and a summons taken out to set it aside

(*a*) *Leigh* v. *Bender*, 4 Dowl. 201, where the plea was delivered at ten minutes to eleven o'clock and after the clerk had left the office to sign judgment, held to be delivered in time; and see *Stafford* v. *Nicholls*, 4 Bing. N. C. 693.

(*b*) *Harrison* v. *Smith*, 9 B. & C. 243. See *Bennett* v. *Potter*, 2 C. & J. 522, *contrà*; but there the prior case was not cited, and as judgment is supposed to be pronounced in Court (as pleadings are supposed to be delivered *vivâ voce*), the former case seems to be correct.

(*c*) See 4 Taunt. 487; 1 B. & P. 363; 2 Chit. R. 119; 8 Dowl. 136.

(*d*) *Shield* v. *Quick*, 8 M. & W. 289; *Fife* v. *Bruere*, 4 Dowl. 329; *Herbert* v. *Darley*, 4 Dowl. 726; *Blackburn* v. *Peak*, 2 Dowl. 293. In *Hill* v. *Mills*, 2 Dowl. 696, where judgment was signed on a plea merely irregular, it was set aside on motion made on the 23rd of May, being the day of executing the writ of inquiry, though notice of such inquiry was served on the 15th of May, the day on which judgment was signed; *Roberts* v. *Cuttill*, 4 Id. 204; *Esdaile* v. *Davis*, 6 Dowl. 469; *Smith* v. *Clarke*, 2 Id. 218, and see Id. 696; 8 B. & C. 421.

was discharged on the 23rd and execution issued on the 27th, defendant moving on the 28th to set judgment aside, was held too late (*e*). He ought to have applied to the Court on the 24th, or, (25th being a Sunday,) at latest, on the 26th. The time runs from notice of judgment being signed, as where a letter is sent stating it to be signed, and the party must not wait, as of course, for the service of a rule to compute (*f*). After assisting at the execution of the writ of inquiry, the party is always too late (*g*); unless, indeed, he never had notice of the prior proceedings. The defendant cannot object to the declaration, or notice thereof, after interlocutory judgment has been signed (*h*).

Waiver of an irregular judgment by defendant.

Defendant waives the irregular judgment by taking a fresh step after notice of its being signed, as we have seen, by attending the execution of the writ of inquiry, or the taxation of costs (*i*), unless it has been signed without any foundation, so as to be null, as signing it because there was no rule to plead several matters, when it was not required (*k*).

By plaintiff.

The plaintiff, also, if he find that he has signed

(*e*) *Shield* v. *Quick*, 8 M. & W. 289.
(*f*) *Per* Littledale, J., *Grant* v. *Flower*, 5 Dowl. 419.
(*g*) *Fraas* v. *Paravicini*, 4 Taunt. 545.
(*h*) *Smith* v. *Clarke*, 2 Dowl. 218; *ante*, "Declaration."
(*i*) Tidd's Prac. p. 930; and *ante*, "Judgment," p. 139.
(*k*) *Archer* v. *Garrard*, 6 Dowl. 132.

it irregularly, may himself waive the judgment, by getting the Master to strike it out; and he may give notice thereof to defendant's attorney, to prevent the expense of an application to set it aside (*l*); and he may so waive it even after application made to set it aside, provided he pay the costs incurred in consequence of the irregularity (*m*). If plaintiff undertake to abandon a judgment he has signed, but does not actually strike it out, defendant need not apply to the Court for that purpose; and where he did so, the rule was discharged, but without costs (*n*).

Regular judgment.

A *regular* judgment will, in many cases, be set aside on an affidavit of merits, and upon terms (*o*).

Terms of not bringing an action.

If the judgment be irregular, it is set aside *ex debito justitiæ*, and the terms of not bringing any action cannot be imposed, though, unless defendant consent to them, costs will seldom be allowed to him (*p*).

Amendment.

See "Judgment."

(*l*) Imp. B. R. 494 n.; *Craven* v. *Aislaby*, Cas. Prac. C. P. 124.

(*m*) *Beeston* v. *Becket*, 4 Man. & Ry. 100; Chit. Arch. Prac. p. 705.

(*n*) *Robinson* v. *Stoddart*, 5 Dowl. 266.

(*o*) See Chit. Arch. Prac. p. 705; 1 Sellon, 346.

(*p*) *Ante*, p. 46.

PLEAD, NOTICE TO.

Omission of. A judgment signed without a notice to plead having been given, will be set aside (*q*).

Less number of days. If the number of days be stated as less in number than they really are, as four for eight days, though plaintiff wait till the expiration of the proper period, and then signs judgment, it has been holden in one case that it would be irregular (*r*); but more recently it was decided that a notice "to plead in ———," must be understood to mean the number of days allowed by the practice of the Court (*s*), and defendant is bound to know this practice.

Greater number of days. If, however, the plaintiff give a greater number of days than is required, the defendant is entitled to the whole period mentioned (*t*).

Date. A mistake in the date is immaterial, as none whatever is necessary (*u*).

PLEAD, RULE TO.

Omission of. A judgment signed without a rule to plead is irregular (*x*); and a rule to plead in a wrong

(*q*) *Fenton* v. *Anstice*, 5 Dowl. 113. Where a declaration is *filed*, it is not necessary to indorse the time for pleading. 2 Arnold, 26.

(*r*) *Braty* v. *Baldock*, Barnes, 302.

(*s*) *Hifferman* v. *Langelle*, 2 B. & P. 363; and see *Collins* v. *Rose*, 5 M. & W. 194.

(*t*) *Solomonson* v. *Parker*, 2 Dowl. 405.

(*u*) *Wyatt* v. *Macdonald*, 2 Scott, 768.

(*x*) See where it is unnecessary, Chit. Arch. Prac. p. 157.

name is as no rule, being a nullity, such as "Ware" for "Warne" (*y*), but not so where rules to plead were entered "*Davis* v. *Tidmarsh*," "*Same* v. *Edmeades*," the word "same" being used for "Davis," and defendant not swearing that he had been misled by it (*z*). If entered before the declaration is delivered, or before notice thereof is served, it is a nullity (*a*).

When to apply.

When judgment was signed without a rule to plead, the Court refused to interfere after a lapse of three years (*b*).

Waiver.

The want of a rule to plead, or any irregularity in it, may be waived by pleading (*c*), unless, as it is now settled, the plea be a nullity (*d*). So obtaining an order for time to plead and the like, or taking out a summons for time, even though no order be made upon it (*e*),

(*y*) *Warne* v. *Bereeford*, 4 Dowl. 361.

(*z*) *Davis* v. *Edmeades*, 1 Dowl. 423, N. S.

(*a*) *Brandon* v. *Payne*, 1 T. R. 689; *Bennett* v. *Smith*, 5 Dowl. 353; *Grey* v. *Saunders*, Barnes, 248.

(*b*) *Lewis* v. *Browne*, 3 Dowl. 700.

(*c*) See cases in n. (*a*).

(*d*) *Warne* v. *Bereeford*, *supra*; *Hough* v. *Bond*, 1 M. & W. 314.

(*e*) *Nugee* v. *Macdonell*, 3 Dowl. 579; and see *Pope* v. *Mann*, 2 M. & W. 881; 5 Dowl. 769, *S. C.*; *Decker* v. *Sheddan*, 3 B. & P. 180; see also *Donne* v. *Marsh*, 7 Taunt. 587; *Nias* v. *Spratley*, 4 B. & C. 386; *Dawson* v. *Garth*, Cas. Prac. C. P. 141; *Pearson* v. *Reynolds*, 4 East, 571; *Towers* v. *Powell*, 1 H. Bla. 87.

or, it seems, though it be returnable too late (*f*).

PLEA, DEMAND OF.

The want of a demand of a plea, where defendant himself has appeared, is an irregularity (*g*). It need not be made where plaintiff has duly appeared for defendant, even though defendant afterwards appear for himself (*h*). A demand of plea before appearance is a nullity (*i*), but if defendant after such demand also plead before appearance, plaintiff cannot treat the plea as a nullity (*k*), as he might have done, had he not made the demand.

Waiver. If defendant plead before a demand of plea has been made, and plaintiff treat the plea as a nullity, he treats it so for all purposes, and cannot afterwards insist that the plea waived the omission of such demand (*l*), and it is the same as if no plea had been pleaded, in which case it is clear a demand would be necessary before judgment.

(*f*) *Pope* v. *Mann*, 2 M. & W. 881; *Bolton* v. *Manning*, 5 Dowl. 769, *S. C.*, *sed quære*. It would seem to be a nullity, and thus not to be a waiver as in the case of the plea.

(*g*) *White* v. *Deal*, 1 B. & P. 341; *Eames* v. *Jew*, Barnes, 276; *Hough* v. *Bond*, 1 M. & W. 314.

(*h*) *Davis* v. *Cooper*, 2 Dowl. 135.

(*i*) *Cook* v. *Raven*, 1 T. R. 635.

(*k*) *Martin* v. *Mahony*, 5 Dowl. & Ryl. 609.

(*l*) *Hough* v. *Bond*, 1 M. & W. 314; *Warne* v. *Bereeford*, 4 Dowl. 361.

In an action by an indorsee against an indorser, the latter having suggested that the indorsement was a forgery, plaintiff, in order to afford time for inquiry, gave an undertaking that he would not sign judgment without a four-days' demand of plea. Defendant on the 9th of November delivered a double plea without a rule to plead several matters, and ruled plaintiff to reply; plaintiff signed judgment on the 11th, and was held regular (*m*),—the putting in the plea, and ruling to reply, operating as a waiver of the undertaking.

See "Plead, Rule and Notice to."

PLEA, PUIS DARREIN CONTINUANCE.

If a plea, *puis darrein continuance*, be accompanied with a proper affidavit, and be not a *nullity*, it must be accepted at any time before verdict given (*n*); and this, it seems, though clearly bad on the face of it (*o*), or though there be reason to believe that it is pleaded for delay (*p*). It seems, that the affidavit of the

(*m*) *Booth* v. *Whitehead*, 8 Dowl. 8.

(*n*) *Todd* v. *Emly*, 1 Dowl. 598, N. S.

(*o*) *Paris* v. *Salkeld*, 2 Wils. 137; *Lovell* v. *Eastaff*, 3 T. R. 554; and see 5 Taunt. 387; 1 Stark. 62; Bull. N. P. 309.

(*p*) *Corporation of Ludlow* v. *Tyler*, 7 C. & P. 537.

matter of the plea, having occurred within eight days, is unnecessary, where such matter arises in the presence of the Judge before whom it is tendered (*q*).

REJOINDER.—(See PLEA.)

If defendant does not rejoin, rebut, &c., or does so by pleading nullities, it is deemed an abandonment of the plea, and plaintiff may strike out all the previous pleadings having reference to the matter omitted to be rejoined, &c. to, and sign judgment as for want of a plea (*r*).

REJOINING, GRATIS.

If the defendant be under terms of rejoining *gratis*, *i. e.*, dispensing with the four day rule to rejoin (*s*), and does not rejoin in time, judgment as for want of a plea (striking out the replication) may be signed. But it has been holden, that such term does not apply to joinder in demurrer (*t*), nor does it bind de-

(*q*) *Todd* v. *Emly*, *suprà*.

(*r*) See *Petree* v. *Fitzroy*, 5 T. R. 152.

(*s*) Which is the only effect of the condition, as he has four days to rejoin from the delivery of the replication. *Adkins* v. *Anderson*, 6 Jurist, 670.

(*t*) *Jones* v. *Key*, 2 C. & M. 340; and see remarks of Lush, Prac. p. 397. See also *Hutchinson* v. *Senior*, 5 Jurist, 387.

fendant except where the issue tendered is to the country (*x*).

REPLICATION.—See PLEA.

RULES, SUMMONSES, AND ORDERS.

Service of a rule, &c., after nine at night, is irregular (*y*), and on a Sunday is void (*z*). Service.

Where a rule is applied for one day, but, from the Court taking time to consider, is granted on another, it should be dated as of the former day (*a*). A summons for time to plead, bearing date the day of the month, is good, though the year be improperly described or omitted (*b*). Date.

It is no ground for treating a rule *nisi* for a new trial as a nullity, that it has been obtained by a different attorney from the one on the record without an order for change (*c*). By different attorney.

An order obtained from the Judge's clerk under a mis-statement is, it seems, a nullity (*d*), Mis-statement.

(*x*) *Jones* v. *Key*, *suprà*.

(*y*) Reg. H. 2 Will. IV. R. 50. It is irregular only, for it may be waived.

(*z*) *M'Ileham* v. *Smith*, 8 T. R. 86.

(*a*) *Egan* v. *Rowley*, 8 Dowl. 145.

(*b*) *Solomon* v. *Nainby*, 7 Dowl. 459.

(*c*) *Doe* v. *Bransom*, 6 Dowl. 490.

(*d*) *Woosnam* v. *Price*, 1 C. & M. 352; to which, in Chit. Arch. Prac. p. 1206, is added a *quære*.

so is a summons when returnable for time to plead, if made returnable *after* the judgment-office opens on the day when judgment may be properly signed (*e*); but not so if returnable *before* the hour at which the Judge attends, when it operates as a stay of proceedings (*f*).

Exparte. If an order be made *exparte* in a case where the opposite party is entitled to a summons, it will be set aside (*g*).

Drawing up. Where a rule *nisi* for judgment as in case of a nonsuit is discharged on a peremptory undertaking, either party may draw up the rule containing the undertaking; and if defendant does so, he must serve it on the plaintiff in time to enable him to try, according to such undertaking (*h*).

Mode of applying to set aside, &c. Where the application is to set aside any thing done under an order or rule, (*e. g.* to strike out pleas pleaded under a rule, &c.) it should be to discharge the rule, or rescind the order (*i*). And so it seems, where the objection is to the materials whereon the order was obtained; thus an application for a discharge on account

(*e*) *Ante*, p. 41.

(*f*) *Byles* v. *Walter*, 5 Dowl. 232.

(*g*) *Clarke* v. *Stocken*, 2 Bing. N. C. 651.

(*h*) *Sawyer* v. *Thompson*, 1 Dowl. 449, N. S.; *Gingell* v. *Bean*, 1 M. & G. 50.

(*i*) *Howen* v. *Carr*, 5 Dowl. 305; see "Plea," p. 162.

of defects in the affidavit to hold to bail, should be directed against the Judge's order, not the *capias* (*k*).

The application to set aside a Judge's order should be made on producing a duplicate original, (not a copy,) (*l*) which should be annexed to, or set forth in, the affidavit; or the affidavit should state the substance of the order, which has been held sufficient (*m*). The same affidavits as were used before the Judge on obtaining the order, may be used in applying to set it aside (*n*). It does not seem necessary to make the order a rule of Court before moving to set it aside (*o*).

Where the order has been made under a mistake, the Judge will vary or amend his order, or sometimes even rescind it (*p*).

The application should be made as early as possible, so as to prevent the other party from incurring further expense (*q*); and, at all events, it should be made in the next term, when the

When to apply.

(*k*) *Hopkinson* v. *Salembier*, 7 Dowl. 493.

(*l*) *Barrett Navigation* v. *Shower*, 8 Dowl. 173; *Holy* v. *Pritchard*, 5 Dowl. 300.

(*m*) *Shirley* v. *Jacobs*, 3 Dowl. 101.

(*n*) *Pickford* v. *Ewington*, 4 Dowl. 453.

(*o*) *Spicer* v. *Todd*, 1 Dowl. 306. And it is the practice not to do so. See 1 Y. & J. 12.

(*p*) See Chit. Arch. Prac. p. 1205.

(*q*) *Thompson* v. *Carter*, 3 Dowl. 657.

order has been obtained in vacation (*r*). After a Judge's order has been made a rule of Court, it is too late to object, in answer to a rule calling on the party to pay money in pursuance thereof, that the Judge had no power to make the order (*s*); so after it has been made a rule of Court, and an attachment obtained upon it (*t*).

Waiver. Any irregularity in the *service* of a rule, &c., is waived by the party on whom it was served moving to enlarge it (*u*), or appearing to show cause against it (*x*); but by appearing, he does not waive an irregularity in the *form* of the rule served, as that it is not entitled in the cause and the like (*y*).

Costs. In general no costs are allowed on rescinding an order (*z*).

SCIRE FACIAS.

Omission of. In cases where a *sci. fa.* is required, if execution be sued out without it, such execution, it seems, is not void, but voidable only on writ of error, or capable of being set aside on

(*r*) *Granby* v. *Frowd*, 11 Leg. Obs. 213.

(*s*) *Wilson* v. *Northorp*, 4 Dowl. 441.

(*t*) *Thompson* v. *Carter*, 3 Dowl. 657.

(*u*) *Cartwright* v. *Blackworth*, 1 Dowl. 489.

(*x*) Tidd's Prac. (9th edit.) 500; *Levy* v. *Duncombe*, 3 Dowl. 447; *Harris* v. *Mullett*, 1 Taunt. 59.

(*y*) *Wood* v. *Critchfield*, 1 Dowl. 587; and see *Clothier* v. *Ess*, 2 Dowl. 731.

(*z*) See Chit. Arch. Prac. p. 1205.

motion (*a*). It is doubtful whether a *sci. fa.* lies on an interlocutory judgment. The Court of Common Pleas refused to entertain the question on motion, and left the party to his writ of error (*b*).

Variance.

The *sci. fa.* must strictly pursue the record on which it is founded, and it should recite a previous *sci. fa.* (if any) on the same judgment, though such previous writ has not been returned and filed (*c*). On a judgment against two, *sci. fa.* cannot be against one (*d*); though on a recognizance of bail it is otherwise, because that is joint and several (*e*).

Teste.

A *sci. fa.* tested in vacation was set aside (*f*); so it is irregular if tested before the time of signing judgment (*g*), or if it state the action to have been commenced by bill, when it was by summons (*h*); or when against bail, if it state they were put in on a day previous to the issuing of the writ of summons in the original action (*i*).

Statement of action.

Mode of applying.

The party who sued out the *sci. fa.* may

(*a*) See "Execution," p. 116.

(*b*) *Bean* v. *Greatwood*, 6 Scott, 891.

(*c*) *Walker* v. *Thelluson*, 1 Dowl. 578, N. S.

(*d*) *Panton* v. *Hall*, 2 Salk. 598.

(*e*) 2 Just. 395; and see 10 B. & C. 751.

(*f*) *Seaton* v. *Heap*, 5 Dowl. 247.

(*g*) *Peacock* v. *Day*, 3 Dowl. 291.

(*h*) *Id.*

(*i*) *Id.* For other instances, see Chit. Arch. Prac. p. 815, 837, and Id. 639.

move to have it quashed for irregularity, and it will be granted on payment of the costs of the proceedings on the *sci. fa.* only (*k*).

Bail. The irregularity in *sci. fa.* against bail, may be taken advantage of by them on motion, though not by plea (*l*); and if a Judge's order has been improperly obtained, allowing a judgment to be signed on a *sci. fa.* where the bail have not been summoned, nor had notice of the proceedings, they should apply to set aside the order, as they will not, it seems, be allowed to impeach it on a motion by them to set aside the judgment on the *sci. fa.* (*m*).

Outlaw. An outlaw may apply for an irregularity in a *sci. fa.* against him (*n*).

When to apply. For want of *sci. fa.*, see "Execution," p. 116, &c.

Waiver. Where a writ of *sci. fa.* had irregularly issued, to which an appearance was entered, and the plaintiff having delivered a declaration, the defendant filed a plea pending a motion to set aside the writ; held, that he had waived the objection (*o*). But not so by appearing in order to save a judgment where the rule obtained to set

(*k*) Reg. H. T. 2 Will. IV. R. 78; *Oliverson* v. *Latour*, 7 Dowl. 605; and see 1 B. & Ald. 486.

(*l*) *Goldney* v. *Laporte*, 2 Bing. N. C. 456.

(*m*) *Ladbrook* v. *Hewett*, 1 Dowl. 488.

(*n*) *Walker* v. *Thelluson*, 1 Dowl. 578, N. S.

(*o*) *Sloman* v. *Gregory*, 1 D. & R. 181.

aside the proceedings did not operate as a stay (*p*).

A *sci. fa.* will often be amended, even after motion made to set it aside, on payment of costs (*q*), and giving the bail time to render, where necessary (*r*). Amendment.

SUMMONS, WRIT OF.

The writ of summons in itself can seldom be void, (though its service may be so,) for by M. T. 3 Will. IV. R. 10 (*s*), the omission of any of the matters required by 2 Will. IV. c. 39, to be inserted or indorsed on any writ or copy thereof, shall render the same not void, but merely irregular.

Where a levy was made on the goods of an accommodation acceptor, who swore that he had never been served with process, it was holden a mere irregularity (*t*); and if the omission of service altogether amount to no more than this, it would seem that a void service (as on a Sunday), though incapable of being itself rendered Omission of service.

(*p*) *Ante*, p. 20.

(*q*) *Englehart* v. *Dunbar*, 2 Dowl. 202; and see Chit. Arch. Prac. p. 1133.

(*r*) *Bradley* v. *Bailey*, 3 Dowl. 111.

(*s*) And see H. T. 2 Will. IV. R. II.; and M. T. 3 Will. IV. R. 5.

(*t*) *Holmes* v. *Russell*, 9 Dowl. 487.

good, would make the subsequent proceedings only irregular (*u*).

Sovereign's name.

The name of "William the Fourth," instead of that of "Victoria," makes the writ irregular, though the name of the Chief Baron be inserted correctly (*x*).

Number of parties.

See "Declaration," *ante*, p. 98.

Names.

If the initials merely of *defendant's* Christian or first name or names be used, though not in the cases allowed by 3 & 4 Will. IV. c. 42, s. 12, or if a wrong Christian name be used, it is no ground for setting aside the process, but the defendant should wait until the misnomer, which it amounts to, be carried into the declaration, and then apply to have the declaration amended at the costs of the plaintiff, under 3 & 4 Will. IV. c. 42, s. 11 (*y*). So if the *plaintiff* be designated by initials, or by a wrong Christian name, the process will not be set aside (*z*); but as the above act seems not to apply to a misnomer of the *plaintiff* (*a*), the proper course may be to plead this in abatement. The *omission* of the Christian name of defendant is no ground for

(*u*) *Ante*, p. 11.

(*x*) *Drury* v. *Davenport*, 6 Dowl. 162.

(*y*) *Rush* v. *Kennedy*, 7 Dowl. 199; *Sarjeant* v. *Gordon*, 7 D. & R. 258; and see 9 Id. 214.

(*z*) *Lindsay* v. *Wells*, 4 Scott, 471; *Morley* v. *Law*, 2 B. & B. 34; and see *Letherbarrow* v. *Ward*, 5 Jurist, 388.

(*a*) *Lindsay* v. *Wells*, *supra*.

setting aside the writ; and where the *mistake* is in the surname, defendant may wait to see whether plaintiff will proceed on the writ, and should not notice it until he receives declaration or notice thereof, when he may move to have the right name inserted, or to set the declaration aside (*b*).

Party who may enter appearance on neglect of defendant to do so.

If the name of the plaintiff be omitted as the person who may enter an appearance for the defendant, it is an irregularity (*c*); but it is not irregular if in an action against several, the words be, "And the said A. B. may cause an appearance to be entered for you," omitting "and for each of you" (*d*).

Residence.

The place and county of defendant's actual or supposed residence must be stated; but if defendant contend that the place of his residence is not in the county mentioned, it lies on him distinctly to show the fact (*e*). The parish need not be mentioned (*f*).

(*b*) *Griffin* v. *Gray*, 5 Dowl. 331; *Hinton* v. *Stevens*, 4 Dowl. 283; where in writ, "Joshua Edwards," instead of "Joshua Stevens;" and see *Johnson* v. *Smallwood*, 2 Dowl. 588. Where plaintiff's name was omitted in process, it was holden a nullity. *Tomson* v. *Brown*, And. 16.

(*c*) *Smith* v. *Crump*, 1 Dowl. 519; where a blank was left for the name.

(*d*) *Engleheart* v. *Eyre*, 2 Dowl. 145.

(*e*) *Rippon* v. *Dawson*, 7 Dowl. 247; *Lewis* v. *Newton*, 4 Id. 355.

(*f*) *Cooper* v. *Wheale*, 4 Dowl. 281.

Title of Court.

The Court refused to set aside a writ requiring appearance in "the Court of Exchequer," omitting "of Pleas" (*g*).

Form of action.

The example given in the act is "on promises," and it is irregular to state it as a "special action" (*h*), or "trespass on the case upon promises" (*i*), or "action on the case promises" (*k*). Not so, however, "action promises," the omission of "on" being a merely clerical error (*l*); so "libel" (*m*), "slander" (*n*), or "trover" (*o*), is sufficient.

Date.

If the date of the issuing of the writ be omitted or mis-stated in the body, it is an irregularity not excused by its being indorsed on the writ (*p*). The date, both as to the day of the month and the year, must be stated in words at full length, and not in figures (*q*). If dated

(*g*) *Salmond* v. *Rollin*, 7 Dowl. 852; and see *Mayhew* v. *Hoadley*, 6 Id. 629.

(*h*) *Moore* v. *Archer*, 4 Dowl. 214.

(*i*) *Gurney* v. *Hopkinson*, 3 Dowl. 189.

(*k*) *Youlton* v. *Hall*, 7 Dowl. 186.

(*l*) *Cooper* v. *Wheale*, *supra*.

(*m*) *Pell* v. *Jackson*, 2 Dowl. 445.

(*n*) *Davies* v. *Parker*, 2 Dowl. 537.

(*o*) *Callaghan* v. *Harris*, 2 Wils. 392; and see *Addis* v. *Jones*, 3 Dowl. 164.

(*p*) *Anon.*, 1 Dowl. 645; *Edwards* v. *Collins*, 5 Dowl. 227. The application in such case must not be to set aside the service alone.

(*q*) See Lush's Prac. p. 316; *Baylis* v. *Hall*, 1 Chit. R.

on a Sunday, the writ is a *nullity*, and the Court is bound judicially to notice that a particular day of the month falls on a Sunday (*r*).

The indorsement of the date when the writ is issued, which is required by rule of Court, is, it seems, only directory, and its omission is no ground for setting aside the writ (*s*).

Memorandum of duration.

The omission of the memorandum of duration is irregular (*t*).

Indorsement of name and residence of person by whom issued.

So when the name or residence of the person by whom the writ was issued, is omitted or stated in a deceptive manner, it is irregular (*u*). The statute not requiring in terms the indorsement to be in the particular form there given, as it does the body of the writ, so strict an adherence is not exacted. The form is given merely as an example (*x*), and if the writ be sued out by an attorney, such a description as cannot mislead is sufficient (*y*). "Southampton Buildings" (*z*),

385. The reason of the former practice to the contrary was, that the date need not have been stated at all, but it is now required by statute.

(*r*) *Hanson* v. *Shackelton*, 4 Dowl. 48.

(*s*) *Millar* v. *Bowden*, 1 C. & J. 563. *Contrà*, as to indorsement of amount. 1 Dowl. 382.

(*t*) *Paterson* v. *Busby*, 7 Dowl. 868.

(*u*) *Id.*; *Shephard* v. *Shum*, 2 C. & J. 632.

(*x*) *Per* Parke, B., *Hannah* v. *Wyman*, 3 Dowl. 673.

(*y*) *Per* Parke, B., *Youlton* v. *Hall*, 7 Dowl. 176.

(*z*) *Rust* v. *Chine*, 3 Dowl. 565.

or "Old Jewry" (*a*), omitting "London," is irregular. The name of a firm instead of the member of it who sued out the writ is regular (*b*). Where the indorsement was, "this writ was issued by A. B., of, &c., attorney for the said—" leaving a blank for the plaintiff's name, it was held irregular (*c*). But where the attorney, whose name was indorsed, was not an attorney of the Court out of which the writ issued, though he was of the other Courts, the proceedings were only stayed until a proper attorney was appointed; the costs of the application to be paid by the attorney whose name was indorsed (*d*). The same particularity seems to be required when the writ is sued out by an attorney as *agent* merely for the plaintiff in person, as when the latter himself sues it out (*e*).

Indorsement of amount.

The rule requiring the amount of debt and costs to be indorsed is not merely directory, and if not made, or made improperly, the writ may be set aside (*f*). If it be made on a writ neither in debt, nor on promises, the writ will be

(*a*) *Smith* v. *Pennell*, 2 Dowl. 654.

(*b*) *Engleheart* v. *Eyre*, 2 Dowl. 145.

(*c*) *Ward* v. *Lloyd*, 1 Wol. P. C. 141.

(*d*) *Constable* v. *Johnstone*, 1 C. & M. 88.

(*e*) *Lloyd* v. *Jones*, 5 Dowl. 161.

(*f*) *Ryley* v. *Boissomas*, 1 Dowl. 383; and this, though the process be against an attorney; *Tomkins* v. *Chilcote*, 2 Dowl. 187.

primâ facie irregular (*g*). If a larger sum be indorsed than is really due, so that defendant is thereby misled and prevented from settling the action within the four days, he will be allowed to stay proceedings on paying the actual debt and the costs of the writ only, if he comes promptly after knowledge of the claim of the reduced amount (*h*). Thirteen days, where judgment had been signed for want of a plea in the mean time, were held too late (*i*). But after the four days have elapsed, plaintiff may declare for more (*k*); the only reason of its indorsement being, that within that period defendant by paying the amount may stay further proceedings.

Alias, pluries and concurrent writs.

An *alias* writ issues at the expiration of four months from the date of the former writ, service of which has not been effected; but concurrent writs issue into different counties at the same time, when it is doubtful in which county defendant is to be found; and it seems clear, that where there can be a concurrent writ, an

(*g*) See *Edwards* v. *Dignam*, 2 Dowl. 240; *Richards* v. *Stuart*, 10 Bing. 319.

(*h*) *Elliston* v. *Robinson*, 2 Dowl. 241.

(*i*) *Id.*

(*k*) *Bowditch* v. *Slaney*, 4 Dowl. 140; and see *Jacquet* v. *Bower*, 7 Dowl. 331. See, as to certainty required in this indorsement, 3 Dowl. 166, 196; 1 Hodg. 316; 4 Bing. 63.

alias is irregular (*l*). There is no irregularity in issuing several writs of summons for the same cause of action, where there are several defendants, if they issue on the same *præcipe*, and are dated on the same day (*m*). The *alias*, &c. will be irregular, unless it correspond in every respect with the original (*n*). By leave of the Court or a Judge, the *alias*, &c. may issue and be tested after the previous writ has expired (*o*). It is of course irregular to issue an *alias*, where the original has been effectually served; but where the service has been void, as on the wrong person, the *alias* or *pluries* may be served on the right person (*p*). Where a writ of *distringas* to proceed to outlawry was taken out, pending which an *alias* writ of summons was issued, the latter writ was holden regular and available, notwithstanding the *distringas*, which had not been delivered to the sheriff, nor otherwise acted upon (*q*).

(*l*) See Lush's Prac. p. 317; and *Coppin* v. *Potter*, 10 Bing. 445; *Dunn* v. *Harding*, Id. 553.

(*m*) *Angus* v. *Coppard*, 4 M. & W. 57; and see *Dunn* v. *Harding*, *suprà*.

(*n*) See *Corbett* v. *Bates*, 3 T. R. 660.

(*o*) *Norman* v. *Winter*, 7 Dowl. 304; and see *Pearce* v. *Swain*, 9 Dowl. 724. The original need not be returned, except to save the Statute of Limitations, or to proceed to outlawry.

(*p*) *Anon.* v. *Johnson*, 2 B. & C. 95.

(*q*) *Norman* v. *Winter*, 7 Dowl. 304.

If plaintiff discover a mistake in the writ, he may before it is served alter it, and then he must have it resealed (*r*); if after service, and before appearance, it seems, he should give notice not to appear; but if after appearance, he should take out and serve a side bar rule to discontinue. Altering writ.

Service on a Sunday is void (*s*). Service.

To set aside proceedings on the ground of *no process* having been served after a positive affidavit of personal service, defendant should show that neither the writ nor copy came to his possession or knowledge (*t*); but to set aside service as irregular, he need not swear that he has not been served with any other regular process (*u*). Application, how.

If before declaration or a particular is delivered, defendant apply to set aside the writ on the ground of its having no indorsement of the

(*r*) *Glenn* v. *Wilks*, 4 Dowl. 322. And if altered without being resealed, the proceedings would be stayed, on payment of debt without costs; and this was done even where the defendant had obtained an order to stay on payment of debt *and costs*, which, it was contended, amounted to a waiver; *Siggers* v. *Sansom*, 2 Dowl. 746; and see, on the subject of alteration, *Anon.*, 2 Chit. R. 237; 2 Bing. N. C. 464, 528.

(*s*) 29 Car. II. c. 7, s. 6; *Taylor* v. *Phillips*, 3 East, 155; 8 East, 547 (*b*).

(*t*) *Phillips* v. *Ensell*, 2 Dowl. 684.

(*u*) *Patterson* v. *Busby*, 5 M, & W. 521; 7 Dowl. 868, *S. C.*; and see *Wintle* v. *Hogg*, 7 Dowl. 623.

amount, he must distinctly show that the action is for a debt (*x*).

If the action in the writ be such as not to require such indorsement, *e. g.*, trespass on the case, and the declaration claim a debt, the irregularity is in the latter, which alone will be set aside (*y*); or if the declaration cannot be found, it will be in the notice of declaration (*z*).

If the service or the copy be bad, apply to set aside the service, or the service and copy; and if the defect be in the writ, apply to set that aside, but never to set aside the copy alone (*a*).

When. For any irregularity in the process, or copy or service thereof, defendant must apply within the eight days limited for appearance (*b*). Where the writ was served on the 25th of October, an application on the 3rd of November (being the first day of term) was holden too late, as it should have been on the 1st, the 2nd being a Sunday (*c*). And where it was sworn that defendant had not been served with any process,

(*x*) *Curwin* v. *Moseley*, 1 Dowl. 432.

(*y*) *Addis* v. *Jones*, 3 Dowl. 164; *Thompson* v. *Dicas*, 1 C. & M. 768.

(*z*) *Addis* v. *Jones*.

(*a*) *Ante*, p. 37.

(*b*) *Child* v. *Marsh*, 6 Dowl. 576; *Crow* v. *Field*, 8 Dowl. 231; *Edwards* v. *Collins*, 5 Id. 227; *Paterson* v. *Busby*, 7 Id. 868, and Id. 530; 4 Id. 283, 726.

(*c*) *Tyler* v. *Green*, 3 Dowl. 439.

and a levy was made on his goods on the 15th of February, an application on the third day of the following Easter Term was holden too late (*d*).

Where, however, the writ was against defendant by a wrong surname, it was held he might wait to see whether plaintiff would proceed on so irregular a writ, and that he was in time within four days from service of notice of declaration (*e*). And there is also an exception, where it is the subsequent proceeding which shows the irregularity in the writ, as where the amount is not indorsed, and it does not appear until declaration or notice thereof, that the claim falls within the rule (*f*).

Too early application.

Where the writ was in case, and the particulars with notice of declaration claimed a debt, a motion to set aside the writ and subsequent proceedings, before it appeared that the declaration had been actually filed, and none could be found, was refused as premature, but a rule *nisi* to set aside the notice of declaration was granted (*g*).

Waiver.

Waiver of irregularity in the writ occurs by appearance, or by undertaking to appear, (but not if plaintiff appear for defendant (*h*),) by

(*d*) *Holmes* v. *Russell*, 9 Dowl. 487.

(*e*) *Hinton* v. *Stevens*, 4 Dowl. 283.

(*f*) Lush's Prac. p. 328; and see *Edwards* v. *Dignam*, 2 Dowl. 240.

(*g*) *Addis* v. *Jones*, 3 Dowl. 164.

(*h*) *Chalkley* v. *Carter*, 4 Dowl. 480.

taking declaration out of the office, by paying part of the debt and costs; or, it seems, by taking out a summons to stay or for particulars (*i*). So a *variance* between the writ and the notice of declaration is waived by taking the declaration out of the office, certainly if the latter be correct; but a variance between the writ and declaration was held not to be waived by keeping the latter, when delivered, until just before the time for pleading, no appearance having been entered (*k*).

Amendment. The copy of the writ after service, being beyond the power of the Court, never can be amended (*l*); an amendment of the writ itself will generally be allowed in one case alone—*viz.*, where by compelling plaintiff to commence *de novo*, the Statute of Limitations would be a bar (*m*). In such case, the Court have amended the form of action, by changing it from debt to promises, though more than four months had elapsed from date of writ, and no service had been effected (*n*); and in an action for demolition by rioters, have allowed the word

(*i*) See *ante*, "Declaration," "Appearance."

(*k*) *Cumming* v. *Elwin*, 3 Bing. N. C. 882; *ante*, p. 105.

(*l*) *Byfield* v. *Street*, 2 Dowl. 739; see *ante*, "Amendment," p. 49.

(*m*) *Hodgkinson* v. *Same*, 1 A. & E. 535; and see 9 Dowl. 529; 2 Id. 633; 6 Id. 627, and cases *infrà*.

(*n*) *Eccles* v. *Cole*, 1 Dowl. 34, N. S.

"Borough" to be substituted for "Hundred"(*o*). The Court of Exchequer have allowed the name of a plaintiff to be added after a plea in abatement for the nonjoinder (*p*), but in the Court of Queen's Bench, after such plea for nonjoinder of a defendant, the power of the Courts to make such an amendment was denied, notwithstanding it was too late to bring another action; and it was intimated the Courts could not go so far as to introduce a new name (*q*). The name of a party, however, has been allowed to be struck out even after issue joined, in all proceedings *subsequent to the writ* (*r*). The writ may be amended so as to render it conformable to the *præcipe* on which it is founded (*s*).

We have hitherto been speaking of amendment in the body of the writ of summons, but the indorsement of the writ is in general amendable under any circumstances, on the terms of plaintiff's paying the costs of the application, and giving defendant four more days to settle the action (*t*).

(*o*) *Horton* v. *Inhabitants of Stamford*, 2 Dowl. 96.

(*p*) *Lakin* v. *Watson*, *suprà*; and see *Holmes* v. *Pinney*, 6 Dowl. 627; 4 Bing. N. C. 454, *S. C.*; but in latter report it seems plaintiff moved to set aside his own proceedings.

(*q*) *Roberts* v. *Bate*, 6 A. & E. 778.

(*r*) *Ante*, p. 129.

(*s*) *Kirk* v. *Dolby*, 8 Dowl. 766.

(*t*) *Urquhart* v. *Dick*, 3 Dowl. 17; *Cooper* v. *Waller*, Id. 167; even after an application to set it aside; *Shirley* v. *Jacobs*, 3 Dowl. 101.

In the Queen's Bench and Exchequer, it is usual to allow a reduction in the amount indorsed to the sum stated in the particulars, so as to make the cause triable before the sheriff (*u*); but time is allowed to the defendant to pay the substituted sum and the costs of the writ only (*x*). In the Common Pleas, however, the power to make this amendment has been denied (*y*).

TRIAL, NOTICE OF.

Omission of. If a trial be had without any notice of it, or with one of too short a period, having been served, the proceedings will be set aside (*z*).

Day. A notice to try at the assizes need not specify any particular day, but it is otherwise if the trial be before the sheriff or the recorder of a borough (*a*). If for the sittings after term held in London, it must specify whether the cause is to be tried at the first day of such sittings, or at the adjournment day (*b*). If given for a day on which there is no sitting, it is void (*c*).

(*u*) *Edge* v. *Shaw*, 4 Dowl. 189.

(*x*) *Frodsham* v. *Round*, 4 Dowl. 570.

(*y*) *Trotter* v. *Bass*, 3 Dowl. 407; see also Chit. Arch. Prac. p. 1124.

(*z*) See *Douglas* v. *Ray*, 6 T. R. 552.

(*a*) *Farmer* v. *Mountford*, 1 Dowl. 366, N. S.; and see Tidd's Prac. (9th ed.) 468.

(*b*) R. E. 51 Geo. III. K. B.; H 32 Geo. III. C. P.; H. 1 Will. IV. Exchequer.

(*c*) *Fell* v. *Tyne*, 5 Dowl. 246.

Where the notice specified the place, as "Guildhall," "Westminster," and defendant swore that he attended at Westminster and was misled, the Court set aside the verdict (*d*). Place.

A notice for four days, where defendant is entitled to eight, is void (*e*). Void if for less number of days than defendant entitled to.

The privilege of giving short notice at any particular sittings does not entitle a party to give short notice for any other sittings (*f*). Short notice.

The rule excepting the Easter holidays from being reckoned in notices and rules, does not extend to notices of trial or inquiry. Hence, notice of trial before sheriff for Easter Tuesday is good (*g*). When given.

It has been held that a continuance of a *void* notice of trial may operate as a new notice, if in itself it give the regular time required for an original notice (*h*); but not so if it attempt to eke out the original time given by the void notice by the addition of part of that time (*i*); and should the first notice turn out to be *good*, the second cannot be treated as an original one; so Continuance.

(*d*) *Cross* v. *Lang*, 1 Dowl. 342.

(*e*) 2 W. Bla. 1298; see *ante*, p. 170.

(*f*) *Slatter* v. *Painter*, 8 M. & W. 672; 1 Dowl. 35, N. S., *S. C.*; *Dignam* v. *Mostyn*, 6 Dowl. 547.

(*g*) *Charnock* v. *Smith*, 3 Dowl. 607.

(*h*) *Tyte* v. *Steventon*, 2 W. Bla. 1298; and see *Fell* v. *Tyne*, 5 Dowl. 246.

(*i*) *Jacob* v. *Marsh*, Barnes, 297.

if it would not operate as a continuance, it would have no effect whatever (*k*).

Two notices at same time.

If two notices of trial for different days be given at the same time, misleading the party, the proceedings after trial will be set aside (*l*).

Countermand and continuance at same time.

Where plaintiff countermanded his notice of trial, and at the same time continued it to another sitting, defendant not appearing, the verdict was set aside (*m*).

Application.

If defendant does not appear at the trial, and plaintiff obtain a verdict, it will be set aside for want of notice, or for one of too short a period, though defendant does not swear to merits (*n*).

Waiver.

Any mere irregularity in the notice of trial, or continuance, or countermand, must be taken advantage of promptly. It would seem, as a general rule, defendant should apply before the trial.

An objection to a notice of trial is not waived by keeping it (*o*), though in one case costs were

(*k*) *Wyatt* v. *Stocken*, 6 A. & E. 803. Notice of continuance must be served the same number of days before the sitting day to which the notice of trial originally referred, as would be required for a notice of countermand, (*i. e.* two clear days,) 1 M. & W. 465; 2 Dowl. 28; only one such notice can be given in a term; 6 A. & E. 803.

(*l*) *Kerry* v. *Reynold*, 2 C. M. & R. 310.

(*m*) *Smith* v. *Hoff*, Cas. Pr. C. P. 146.

(*n*) *Williams* v. *Williams*, 2 Dowl. 350; *Wright* v. *Carr*, 2 Jurist, 516.

(*o*) *Dignam* v. *Mostyn*, 6 Dowl. 547; *Wardle* v. *Ackland*, 2 Dowl. 28.

refused, because it was not returned (*p*). As the only object of the notice is to let in any defence to the action that may exist, if defendant appear and defend, he cannot afterwards object to want of regularity in the notice, nor even to a want of notice altogether (*q*).

So where the notice improperly omitted the day of trial (in a trial before a recorder of a borough), but defendant, on taking out a summons to set aside the notice of trial, objected to the want of jurisdiction alone, he was holden to have waived it (*r*), and so other irregularities were waived where he served a rule to tax costs upon the verdict (*s*).

WARRANT OF ATTORNEY AND COGNOVIT.

It is proposed to give a few instances of such defects in these instruments as render them void, or the judgment signed upon them irregular.

By 1 & 2 Vict. c. 110, ss. 9, 10, a warrant of attorney in any *personal* action, or a cognovit given by *any* person, is *void*, unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant of attor- Void by 1 & 2 Vict. c. 110.

(*p*) *Stevens* v. *Pell*, 2 Dowl. 355.
(*q*) *Doe* v. *Jepson*, 3 B. & Ad. 402; and see 4 Taunt. 545.
(*r*) *Farmer* v. *Mountford*, 1 Dowl. 366, N. S.
(*s*) *Tyte* v. *Steventon*, 2 W. Bla. 1298.

ney or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and *thereby* declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. As the statute declares that a non-compliance with these provisions shall avoid the instrument, of course the objection can be waived by no laches (*t*). It has been decided, however, that a warrant of attorney in *ejectment* is not within the above section (*u*), though a cognovit is (*x*). A consent in writing by a defendant that a Judge's order may be obtained for plaintiff to sign judgment, unless debt and costs be paid within a certain time, is not within the statute (*y*).

Exceptions.

Filing, &c.

A warrant of attorney or cognovit in any personal action is void, as against assignees of a bankrupt or insolvent (*z*), if not filed within twenty-one days from the execution thereof, or if judgment be not signed, or execution executed within that period, and where at any time after that period a commission of bankruptcy shall have issued against the person who gave

(*t*) *Gripper* v. *Bristow*, 8 Dowl. 797.

(*u*) *Doe* v. *Kingston*, 1 Dowl. 263, N. S.

(*x*) *Doe* v. *Howell*, 4 P. & D. 361.

(*y*) *Thorne* v. *Neale*, 2 G. & D. 48; *Bray* v. *Manson*, 8 M. & W. 668; Id. 670; 9 Dowl. 748, *S. C.*

(*z*) 1 & 2 Vict. c. 110, s. 60.

such warrant, &c. under which commission he shall be declared a bankrupt (*a*).

Warrant of attorney, good in part.

If a warrant of attorney be not altogether void, but good as to part, and bad as to the residue, the Court will destroy the effect only of the bad part (*b*).

Signing judgment.

The authority given must be strictly pursued. Thus, if it authorize judgment at the suit of A., it cannot be entered up at suit of A.'s executors (*c*); or if judgment on a bond be authorized, it will be irregular entered on any other demand (*d*). So if entered against one, where the power is to enter it against two without words of severalty (*e*). So if it be to sign judgment of a term, and it be signed in vacation (*f*); or if to sign it as of a preceding term, or any subsequent term, and plaintiff sign it in vacation, unless he does so as of the term *preceding* (*g*).

Before appearance.

Judgment signed on a cognovit, without plaintiff having entered an appearance, is irregular (*h*).

Application.

The application to have the warrant of attor-

(*a*) 3 Geo. IV. c. 39, s. 2; and see 2 Man. & Grain. 269.

(*b*) See *Holdsworth* v. *Wakeman*, 1 Dowl. 532; *Smith* v. *Alexander*, 5 Dowl. 13.

(*c*) *Short* v. *Coglin*, 1 Ans. 225.

(*d*) *Paris* v. *Wilkinson*, 8 T. R. 153.

(*e*) *Gee* v. *Lane*, 15 East, 592; *Jordan* v. *Farr*, 2 A. & E. 437.

(*f*) *Todd* v. *Gompertz*, 6 Dowl. 296.

(*g*) *Cobbold* v. *Chilver*, 11 Law Journ. 173, C. P., N. S.

(*h*) *Watson* v. *Dow*, 5 Dowl. 584.

ney given up to be cancelled, or to have judgment and execution upon it set aside, if the defect be a substantial one, as that it was given for an illegal or fraudulent consideration, may be made by any person interested in impeaching its validity, though not a party to it (*i*); and where given for a fraudulent purpose, with the privity of the defendant, it seems that the application can be made only by third parties (*k*), for a party shall not be allowed to take advantage of his own wrong. But a mere formal objection, and one not amounting to more than an irregularity, cannot be made by any person but defendant or his representatives (*l*).

WRITS IN GENERAL.

Return of.

Writs returnable on a *dies non* are void (*m*), and a *pone per vadios* was set aside for being returnable in vacation; and it was held no excuse that the Almanacks were wrong as to the first day of term (*n*).

Teste.

A writ is void, if tested in vacation, when it should be tested in term (*o*).

(*i*) *Harrod* v. *Benton*, 8 B. & C. 217; *Martin* v. *Martin*, 3 B. & Ad. 934.

(*k*) Id., and see *Doe* v. *Roberts*, 2 B. & Ald. 367.

(*l*) *Walker* v. *Harris*, Excheq., 8 June, 1839; cited Chit. Arch. Prac. p. 691, n. (*q*); see *Jones* v. *Jones*, 1 D. & R. 558.

(*m*) *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

(*n*) *Wright* v. *Lewis*, 1 Wol. P. C. 42.

(*o*) *Hart* v. *Weston*, 5 Burr. 2586.

So a writ is void, if served on a Sunday; *ante*, "Service of Summons," &c. Service.

For variance between original and *alias*, see Index, "Alias;" and see *ante*, "Arrest," "Execution."

CORRIGENDA.

Page 108, l. 15, for "declaration, &c." read "debt on a bill or note."

Add to p. 108, n. (*o*), *Hatch* v. *Trayes*, 3 P. & D. 408; where debt was held to lie on a bill of exchange, though it did not express to be drawn for "value received" or other consideration.

Page 109, n. (*o*), for "*Crisp* v. *Griffiths*," read "*Cresswell* v. *Crisp*."

113, l. 8, for "if it be sued out before judgment is signed," read "if it be returnable before judgment is given;" and add to note, "*Stevens* v. *Ingram*, 3 Taunt. 384."

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William Stevens, Printer, Bell Yard, Temple Bar.

In order to proceed by Attachment all Orders made in any way connected with the adjudication of Costs, and the Masters' Allocation must first be made rules of Court because it is only the non observance of the unqualified direction of the Court in banc that constitutes the contempt to be punished by Attachment 3 Chit. Gen. prac 603. cites Chilton v Ellis 2 Crom & M. 469 2 Dowl 338 P.C. Ryalls v Emerson 2 Crom & M. 467 Woolison v Hodgson 3 Dowl 678