GEORGE CARLISLE *et ux. versus* EZRA WESTON Junior.

The service of processes by a coroner being by virtue of a special authority, and not coming within the general duties of that officer, all the facts necessary to give him the power should appear in the writ itself; and a general direction to him is not sufficient.

But where a writ was served by a coroner, and though it did not appear affirmatively on its face that he had authority to serve it, yet it did not appear negatively that he had not such authority, it was *held*, that the defendant, by appearing and pleading to the action, had cured the defect in the service.

TRESPASS. The defendant was described in the writ as formerly a deputy of the sheriff of the county of Suffolk. The writ was served by a coroner. At the return term the defendant entered his appearance generally, and subsequently put in a plea of not guilty, and joined in a demurrer, (with a reservation of liberty to waive his plea,) by which the action was brought up from the Common Pleas to this court. He entered his appearance generally in this court, waived his plea filed in the Common Pleas, and moved that the action be dismissed for want of legal service, the same having been made by a coroner; who, at that time, as the defendant alleged, had no authority to make the service. The defendant was a deputy sheriff for the county of Suffolk, and acted as such at the time when the supposed trespass was committed.

Brigham, for the defendant. The coroner had no authority to serve the writ, the sheriff not being a party, nor interested in the case; *St.* 1783, *c.* 43, § 1; *Merchants Bank* v. *Cook*, 4 Pick. 410; Revised Stat. *c.* 14, § 97; and the service being a nullity, the Court has no jurisdiction. *Wood* v. *Ross*, 11 Mass. R. 271; *Hart* v. *Huckins*, 6 Mass. R. 399. *March 14th*

The general appearance did not cure the defect. A mere nullity cannot be cured; an irregularity may be. 3 Chit. Gen. Pract. 523, 524; *Taylor* v. *Phillips*, 3 East, 155; *Roberts* v. *Monkhouse*, 8 East, 547; *Case* v. *Humphrey*, 6 Connect. R. 139; *Bunn* v. *Thomas*, 2 Johns. R. 190; *Bailey* v. *Smith*, 3 Fairfield, 196.

B. Sumner, for the plaintiff. The general appearance, and *à fortiori* the pleading to the merits, is a waiver of the alleged

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insufficiency of the service. *Ripley* v. *Warren*, 2 Pick. 592 *Eaton* v. *Whitaker*, 6 Pick. 468; *Moody* v. *Blake*, 6 Mass R. 459. Although the defendant may have ceased to be a deputy, the sheriff may nevertheless be responsible for his act complained of as a trespass; *Grinnell* v. *Phillips*, 1 Mass. R. 530; *Knowlton* v. *Bartlett*, 1 Pick. 274; and unless it appears clearly on the face of the writ, that the sheriff was not interested, the Court will not dismiss the action on motion.

March 18th. MORTON J. delivered the opinion of the Court. Formerly a coroner was authorized to serve process when the sheriff or his deputy was a *party*. *St.* 1783, *c.* 43, § 1; *Merchants Bank* v. *Cook*, 4 Pick. 410. But by the Revised Statutes, *c.* 14, § 97, this power was modified, and, in some respects, extended; so that a coroner may now serve any writ in which the sheriff is *interested*.

The service of process by a coroner, being a special authority, and not coming within the general duties of that officer, all the facts necessary to give him the power should be made to appear in the writ itself; and a general direction to him is not sufficient. *Case* v. *Humphrey*, 6 Connect R. 139. This omission too is a defect, of which, as it appears on the record, the Court will *ex officio* take notice, or of which the defendant may take advantage on motion or in error. *Wood* v. *Ross*, 11 Mass. R. 273; *Bunn* v. *Thomas*, 2 Johns. R 190; *Lawrence* v. *Smith*, 5 Mass. R. 362; *Tingley* v. *Bateman & Tr.* 10 Mass. R. 344; *Taylor* v. *Phillips*, 3 East, 155; *Roberts* v. *Monkhouse*, 8 East, 547.

The only question in the present case is, whether the defendant, by his appearance and pleading to the action, has cured the defect in the service. The general rule upon this subject is, that irregularities and defects may be waived, but mere nullities cannot be cured, or restored to life, inasmuch as they never possessed any legal vitality. Jurisdiction cannot be given by consent of parties. 3 Chitty's Gen. Pract. 524.

The cause of action and the parties, were clearly within the jurisdiction of the Court. The service of the writ was made by the officer to whom it was directed, and who, in certain cases, was authorized to serve such precepts. And although it does not appear *affirmatively*, that the sheriff was interested

in the suit, so it does not appear *negatively* that he was not interested. The defendant, by appearing and pleading to the action, admits the jurisdiction, that is, in this case, admits the fact which is necessary to make the service valid.

It is an elementary rule of pleading, that a plea to the jurisdiction is the first in the order of pleading; and that any plea which refers to the court any other question, is a tacit admission that the court has a right to judge in the cause, and is a waiver of all exception to the jurisdiction. Gould's Pl. 231; 1 Chitty's Pl. 478. Wherever it appears upon the record, that the court has no jurisdiction, nothing which the parties may do or omit to do will give it; but where the want of jurisdiction must be shown by proof *aliunde*, or where the particular facts giving the jurisdiction may exist consistently with the record, a plea to the action is a waiver of any exception to the jurisdiction.

In the case of *Gage* v. *Gannet*, 10 Mass. R. 176, which was an action by a county treasurer against the clerk of the courts on an official bond, the court say, "It does not appear on the face of the record, that the county is directly interested. But the defendants have waived this exception, by appearing and pleading to the action in the Common Pleas."

The case of *Ripley* v. *Warren*, 2 Pick. 592, is a much stronger case than the present. There the writ bore teste of one of the associate justices of the Common Pleas, contrary to a provision of the constitution; and yet the Court say, "We think we are well warranted in holding that the writ in this case, though originally defective, has been made good by the defendant himself, who has submitted to it without questioning its validity, through all but the last stage of the process."

The irregularity in the service of this writ could do the defendant no possible injury. He was seasonably notified of the commencement of the action, appeared on the return day of the writ, made such motions and filed such pleas as he thought best adapted to protect his legal rights, and now has open to him every ground of defence, and may avail himself of every legal exception which he could have done, had the writ al-

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leged that the sheriff was interested, or had it been directed to and served by the sheriff himself.

On the whole, we are well satisfied, that this was an irregularity which the defendant might waive, and that by appearing and pleading to the action, he has cured the defect in the service.

Motion overruled.

Ezra O. Eaton *versus* Ann Dugan.

Where in an action of debt for rent, the declaration consisted of a single count setting forth a special contract, *not in writing*, whereby the plaintiff leased to the defendant a tenement, for one month, at a specified rent, but the evidence was merely that the defendant, with the permission of the plaintiff, *occupied* a part only of such tenement, it was *held*, that, as there was no general count this was a fatal variance.

Debt for rent. The declaration consisted of a single count, setting forth, that the plaintiff leased to the defendant "the second and upper stories of a messuage and house, with the appurtenances, situated" &c. "to have and to hold the same to her for a certain time, to wit, for one month, and so from month to month while said lease continued, yielding and paying therefor so long as she should hold the same, the sum of twelve dollars and fifty cents each and every month, payable in advance on the fifteenth day of each month, by virtue of which demise said Dugan entered into and was in possession of said premises until the fifteenth day of the present month of July, when a large sum of money, to wit, twenty-five dollars, for said rent was due, which is still in arrears and unpaid."

The defendant pleaded the general issue.

At the trial, in the Court of Common Pleas, before *Ward* C. J., no contract in writing was produced or proved to have existed, whereby the plaintiff had demised the premises to the defendant, or had agreed to permit her to occupy them for any length of time, or for any certain rent. But it appeared in evidence, that the plaintiff had, previously, leased all the rooms above mentioned, except one in the second story, which he retained for his own use, to one M'Donough, for the sum of