

which are the subjects of actions on the case, the courts cannot construe the enactment so as to hold that this cause of action survives.

The administrator also sues for injuries to the intestate's real estate, caused by a continuance of the same mill-dam, and relies upon Gen. Stats., ch. 179, sec. 19; but he fails to allege any title to the land in the administrator, or any right to sue; on the contrary, he alleges the injury to be to the heirs and assigns of the deceased. It is very clear, we think, that it should appear in the declaration that the plaintiff, as such administrator, has a right to sue, as he would have if the intestate died seized and the estate was insolvent, and the administration not closed. But nothing of this kind is alleged; and, for aught that appears, the property has descended to the heirs, and they alone can sue. The statute of 1872, chapter 48, does not apply to pending suits, and cannot save this case.

Demurrer sustained.

COREY v. SUMNER.

The same magistrate to whom complaint for bastardy is made should issue the warrant upon said complaint.

When the complaint was made before a justice of the peace in Vermont, and the warrant was issued by a justice in New Hampshire, the proceeding was held irregular.

Such defect will not be waived by the respondent by waiving the complaint and warrant and giving bond for appearance at court, if he had no knowledge of the defect, and made his objection as soon as it came to his knowledge.

This is a proceeding under the bastardy act, in the name of the State, by Maria W. Corey against James B. Sumner, Jr. The respondent was arrested under a warrant issued by a justice of the peace in this county upon a complaint made and sworn to in Vermont, before a justice of the peace of that State. The respondent was taken before a Coös county justice of the peace, and there, without hearing the complaint read, and without knowledge that it was so made in Vermont, he waived the reading of the complaint, and the examination, and gave bond for his appearance at the supreme judicial court. The proceeding was entered at the April term, 1871,* and the respondent season-

* The Gen. Stats., ch. 76, sec. 4, which took effect January 1, 1868, substituted a recognizance for the bond required by former statutes.

ably moved to dismiss the complaint and that the same be quashed ; and the court, subject to exception, granted the motion.

The questions of law were reserved.

Benton & Ray, for the complainant.

Burns & Heywood, for the defendant.

SARGENT, C. J. The case finds that the respondent, without knowledge that the complaint was made in Vermont, waived the reading of said complaint and warrant at the hearing before the justice, and gave bond for his appearance at the supreme judicial court. The proceeding was entered April term, 1871, and the respondent seasonably moved to dismiss the complaint and that the same be quashed.

Gen. Stats., chapter 76, section 1, provide that any woman, pregnant with a child, which, if born alive, may be a bastard, may make complaint in writing, under oath, to any justice of the peace, against any man, &c. ; and said justice may thereupon issue his warrant, &c.

From this language, it is apparent that the complaint must not only be made to a justice of the peace in this State, but that it must be made to the same justice who afterwards issues the warrant. Said justice shall thereupon issue his warrant. The warrant in this case was improperly issued, and stands, in fact, no better, that we can see, than a warrant issued without any complaint at all, which clearly could give the magistrate before whom such warrant was returned no jurisdiction of the case. It would stand very much like the writ in the case of *Kidder v. Prescott*, 24 N. H. 263, which was process under the landlord and tenant act, where the plea raised the question of title ; and the action was entered in the court of common pleas, under the provisions of the statute in such cases. There the action was answered to, without objection, before the magistrate. But when the copies were sent up, and after entry in the court above, it was ascertained by the certificate of the magistrate that the writ had not been signed by him, but by the plaintiff's attorney, by his consent and by his special authority, though not in his presence. This appeared by the certificate of the justice upon the copies. The motion to quash was granted, although the defendant had pleaded to the merits before the magistrate. It was done, so far as appears, without knowledge of the defect. *Ela v. McCoville*, 35 N. H. 279 ; *Warren v. Glynn*, 37 N. H. 340.

In this case, the defendant had reason to suppose that there was a legal warrant against him,—as in that case, that the signature of the magistrate was genuine ; and his waiving of the reading cannot be considered as a waiver of any objections to the complaint, which were not known to the respondent, and which he had no reason to suspect the existence of.

It is stated, as a general rule, that motions to dismiss should be made at the first term after entry here—*Hanson v. Hoitt*, 14 N. H. 60, and cases cited ; *Rogers v. Odell*, 39 N. H. 418—while it is held that

all such objections are waived by pleading to the merits, issue, trial, and verdict—*Lowell v. Sewell*, 15 N. H. 37. The motion to quash, in this case, was made at the first term upon entry in this court, and at the earliest possible period after the objection was known to the respondent. We think this is sufficient, and that the motion to quash was properly granted, and that the exception must be overruled.

Proceedings quashed.

FORRIST v. LEAVITT.

Where a justice of the peace, assuming to act under the authority conferred by chapter 236, section 7, Gen. Stats., by verbal warrant ordered an officer to arrest an alleged offender against the law,—*Held*, that it was the province and duty of the justice, alone, to decide as to what constitutes an offence; and that it makes no difference whether the officer observed the commission of the offence or not. The officer, acting in good faith, and in obedience to the order, even though he might not himself believe the party to be guilty, and though the justice might not have acted in good faith, nor upon reasonable belief of the party's guilt, is, nevertheless, justified in making the arrest.

TRESPASS, by Oliver Forrist against Henry M. Leavitt, a deputy sheriff, for assault and false imprisonment.

The defendant, with the general issue, filed a brief statement, alleging, among other things, that the plaintiff was guilty of making a brawl and tumult, and of rude and disorderly conduct in the highway, and of being a night-walker; that a justice of the peace, upon view of these offences, ordered the defendant to arrest the plaintiff, and that the defendant thereupon arrested him without any written warrant. It appeared that the justice, in the plaintiff's presence, ordered the defendant to arrest the plaintiff, but whether the justice viewed any of said offences was a matter in controversy. The arrest was made at about eleven o'clock at night, instantaneously upon the giving of the order. The defendant requested an instruction that it is entirely with the justice to decide as to what constitutes an offence, and it makes no difference whether the sheriff views the offence or not. If he acts upon such order, and acts in good faith, he is justified; and the order justifies the sheriff, whether the offence actually existed or not, if he acts in good faith. The court declined so to instruct the jury, but instructed them, among other things, that the order of the justice did not justify the sheriff, unless the justice viewed the commission of some one of the offences described in the brief statement. The jury returned a verdict for the plaintiff.