

plaintiff's drain did not occasion the injury, nor contribute to it. This finding makes it unnecessary to consider the exceptions to the evidence, and to the instructions of the court relating to the question of waiver, by the defendants, of the requirements of their ordinance.

The object of the ordinance was, to require the plaintiff to prevent the flowing back of water from the defendants' sewer; and as the jury found that the injury complained of was not the result of the plaintiff's failure to comply with the ordinance, he is not barred by it from recovering.

A request for instructions to a jury, that a variance exists between the proof and declaration, when no objection to the evidence or motion for a nonsuit has been made, is out of season. Objections to evidence, unless made at the earliest practicable moment after its introduction and its bearing is understood, will ordinarily be considered as waived—*Bassett v. Salisbury Mfg. Co.*, 28 N. H. 452, and *Gardner v. Kimball*, ante, p. 202; and a motion to exclude evidence already presented, because of its irrelevancy or inapplicability to the issue, should be made before argument and charge to the jury. *Judge of Probate v. Stone*, 44 N. H. 593. We do not decide that the judge cannot entertain the objection of variance at any stage of the trial, if justice requires it, but we are of opinion that he is not bound to entertain it out of season, and his refusal to do so is no ground for exception.

*Judgment on the verdict.*

STANLEY, BINGHAM, SMITH, and CLARK, JJ., did not sit.

---

BEDFORD v. RICE & ux.

A plea in abatement must be filed in the first court in which the defendant has an opportunity to file it.

DEBT, to recover a penalty. The action was returnable to the police court of Manchester, under the provisions of c. 21, Acts of 1876. The *ad damnum* exceeding \$13.33, the defendants on the return day demanded in writing a jury trial, and the action was thereupon transferred to this court. Within the first four days of the first term the defendants filed a plea in abatement, alleging that no summons in the form prescribed by law had been served upon them. The officer's return showed that due service of the writ had been made. The summons was produced in court, but was not enrolled.

The plaintiffs contended that the plea, not having been filed in the police court, could not be filed after transfer to this court. But the court ruled, as matter of law, that the plea was seasonably filed, and

the plaintiffs excepted. The plaintiffs demurred to the plea, which the court sustained, and the defendants excepted.

*O' Connor*, for the defendants.

*Clark, Bartlett & Mills*, for the plaintiffs.

SMITH, J. The plea is bad. *Dinsmore v. Pendexter*, 28 N. H. 18; *Parker v. McKean*, 34 N. H. 375, and authorities cited.

A plea in abatement should be filed in the first court in which the defendant has an opportunity to file it, to avoid the cost of further litigation, if the plea is good. The defendant might file the plea with his demand for a jury trial, and neither would be a waiver of the other. The demand is an objection to the police court trying a case, when the sum demanded in damages exceeds the constitutional limitation of \$13.33.

*Respondent ouster.*

STANLEY and CLARK, JJ., did not sit.

---

STEARNS v. WALLACE.

When an infant under guardianship is sued, the process should be served upon his guardian.

TRESPASS, for an assault. The defendant was described as an infant, under the guardianship of Harriet G. Wallace, and the officer was commanded by the writ to "summon said Harriet G. Wallace, in her said capacity, to appear," &c. The officer's return showed service of the summons upon the guardian, and there was a general appearance entered for her and her ward. The plaintiff was allowed to amend so that the precept would require the officer to "summon said William R. Wallace, and said Harriet G. Wallace in her capacity aforesaid"—to which they excepted. The declaration alleges an assault committed by the infant defendant on the plaintiff. The defendant filed a general demurrer, which was overruled, and he excepted.

*Wadleigh & Wallace*, for the defendants.

*Bailey & Cutter*, for the plaintiff.

SMITH, J. The statute authorized the suit to be brought against the ward "by his guardian," that is, by process served on his guardian. Gen. St., c. 165, s. 4. If the writ should have commanded the sheriff