

Case No. 4,392. ELLIOTT ET AL. V. HOLMES ET AL.
[1 McLean, 466.]¹

Circuit Court, D. Illinois.

June Term, 1839.

SERVICE OF WRIT ON PERSON NOT NAMED THEREIN—AMENDMENT BY CONSENT.

1. Where a writ is served on a person of a different name from the one against whom it was issued, and there is no appearance, the plaintiffs cannot proceed.

[Cited in *Kelley v. Mississippi Cent. R. Co.*, 1 Fed. 568.]

- 2 In such a case the writ may be amended, by consent of parties, on the payment of costs.

OPINION OF THE COURT. The writ in this case was issued against Valentine B. Holmes, and it was served on Vivian B Holmes, against whom the declaration was filed.

The defendant did not appear, but Mr. Baker, his counsel, suggested to the court, that the service of the writ, having been made on a person different from the one named in the writ, the plaintiffs could not proceed in the case. That if the defendant fail to appear, the writ must have been regularly served on him, before he can be considered in court, so as to authorize a judgment against him.

This motion was opposed by Davis & Forman, who appeared for the plaintiffs; but the court held that the proceedings were irregular, and that the question might be brought before the court, in the mode adopted, or by a plea in abatement for a variance between the declaration and the writ. In England, a plea in abatement for such a variance cannot be filed, as a copy of the writ is refused.

On suggestion of the court, the plaintiffs, by consent, were permitted to amend the writ on the payment of all costs, and a continuance of the cause.

¹ [Reported by Hon. John McLean, Circuit Justice.]