scire facias that there are others not warned, see Foxwist v. Tremaine, 2 Wms. Saund. 210 n. *e.;* Prather v. Manro, 11 G. & J. 261; Doub v. Barnes, 4 Gill, 1; to a plea in abatement that the writ was never returned, though in giving *oyer* the plaintiff had not set it out, Sherman v. Alvarez, 1 Str. 639; and it has been expressly decided by the Court of Appeals that infancy of the plaintiff is matter in abatement and such a plea must be verified by affidavit under this Statute, Graham v. Fahnestock, 5 Gill, 215; see Code Art. 75, sec. 22, sub-sec. 82,[19] for form of the plea. A plea of coverture, that the defendant has married since she entered into the contract or committed the *tort,* is a dilatory plea within the Statute, and the plaintiff is entitled to judgment for want of a plea, though part of the cause of action occurred after the coverture, Lovell v. Walker, 9 M. & W. 299. So coverture of the plaintiff is matter in abatement, Bender v. Wakeman, 12 M. & W. 97; Morgan v. Cubitt, 3 Exch. 612.[20] But the section has been held not to extend to matters apparent on the record, see Grey v. Sidneff, 3 B. & P. 397; 1 Chit. Pl. 452, 453. If there be no affidavit, or it be defective, or if it be not in time, see Whittington v. Farmers' Bank, 5 H. & J. 489, the plaintiff may treat the plea as * a nullity and sign judgment or **668** move the Court to set it aside, and the practice here is to move the Court to strike it out, Deheaulme v. Boisneuf, 4 H. & McH. 413; Graham v. Fahnestock *supra.*[21] And a case is reported where the plea and affidavit being *wrong entitled* the plea was set aside, Clixby v. Dines, Barnes, 348. It is not necessary that the affidavit should be made by the party himself; the affidavit of the attorney to the truth of it is sufficient, Lumley v. Foster, *ibid.* 344; see Horsfall v. Matthewman, 3 M. & S. 154. The affidavit ought to be positive to the truth of every matter of fact contained in the plea and leave nothing to be collected by inference; the words *probable* cause in the Act only relate to a matter of record, 2 Harr. Ent. 271, or some other collateral matter as to the truth of which there cannot be a positive affidavit, and a mistake in the name of the parties is fatal, though the affidavit give a right reference, Richards v. Settree, 3 Price, 197; Pearce v. Davis, Sayer, 293. See the form of the affidavit, 2 Harr. Ent. 276, Code Art. 75, sec. 22, sub-sec. 84.[22] As the affidavit is only required for the benefit of the plaintiff it may be waived by him, Grahame v. Ingleby, 1 Exch. 651. By the Code, Art. 75, sec. 11,[23] 1785, ch. 80, sec. 3, the plea of

[19] Code 1911, Art. 75, sec. 24, sub-sec. 82.

[20] See Poe's Pleading, secs. 397, 659. Of course, since the Act of 1898, ch. 457, (Code 1911, Art. 45, sec. 5), a plea of coverture is no longer possible.

[21] A motion of *ne recipiatur* seems improper, at least where a review of the action of the lower court is desired. This should be presented on appeal by a bill of exception. Spencer v. Patten, 84 Md. 423.

[22] Code 1911, Art. 75, sec. 24, sub-sec. 84; Carroll v. Bowen, 113 Md. 154. Replying to a plea in abatement which is without affidavit does not waive the defect in a criminal case. *Quaere,* as to a civil action? Johns v. State, 55 Md. 356.

[23] Code 1911, Art. 75, sec. 11; State v. Duvall, 83 Md. 124.