

Rogers v. Hall.

the *scire facias*, and the first day of term. The plaintiffs in error, then, had the right, after assigning errors, to take a rule upon the defendant to join in error, who was bound to be in Court, and comply with the rule. It was not complied with, although not taken by the plaintiffs until the eighth day of term, and twelve days after the service of process; consequently, the plaintiffs were entitled to their judgment by default, according to the terms of the twenty-fourth rule.

It is, however, urged that there was in fact no assignment of errors by the plaintiffs, on which to predicate a rule upon the defendant to join in error; and this is the second reason urged in support of the motion. The twenty-third rule requires that the assignment of errors and joinder shall be written on or directly appended to the record in the cause in which they are assigned. None appears in this case, and we have no knowledge that any was filed, yet the question arises, for this irregularity is this application in time? and if in time, should not notice of it be given to the opposite party?

Where a judgment has been taken irregularly, by default, as would appear to be the case here, the party against whom it operates, should avail himself of the first seasonable moment after the irregularity is discovered, to correct it. The defendant in error had the whole of June and December terms, in which to apply to the Court for that purpose. Not having done so, and showing to the Court no reason why he did not, he cannot now be permitted to disturb a judgment which was the result of his own laches.

As a rule of practice, the Court would suppose, that in motions like this, after such a lapse of time, the opposite party should have notice.

In the case decided at this term, of *Pettus et al. v. Crow et al.*, (1) the opposite party had notice of the motion, and although several terms had elapsed, after the default was taken, the motion to set it aside was allowed, on the ground that this Court had no jurisdiction in the case, no appeal bond having been filed, in pursuance of the order of the Circuit Court allowing the appeal.

Motion denied.

GEORGE B. ROGERS, appellant, v. ROBERT C. HALL, appellee.

Appeal from Schuyler.

A bill of exceptions, under the practice act, is not to be considered as a writing of the judge, but it is to be esteemed as a pleading of the party alleging the exception; and if liable to the charge of ambiguity, uncertainty, or omission, it ought, like any other pleading, to be construed most strongly against the party who prepared it.

(1) *Post.*

4	5
24a	31
4	5
29a	29
4	5
33a	299
33a	455
4	5
136	513
35a	316
4	5
41a	146
4	5
44a	77
44a	130
44a	178
44a	387
44a	516
44a	527
4	5
49a	281
49a	314
51a	306
51a	376

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THIS cause was tried in the Schuyler Circuit Court, at the March term, 1840, before the Hon. Peter Lott and a jury. Verdict and judgment were rendered for the defendant, and the cause brought to this Court by the plaintiff, by appeal.

S. T. LOGAN, for the appellant.

O. H. BROWNING, E. D. BAKER, and B. S. EDWARDS, for the appellee.

FORD, Justice, delivered the opinion of the Court :

This is an action on the *case for slander*. The words charged to have been spoken, are that the plaintiff had attempted to assassinate and murder the defendant. The defendant justified by pleading the truth of the words ; and on the trial of the issue thereon, proved, that some person unknown to the witness, had shot at, and attempted to assassinate, the defendant ; and for the purpose of identifying the plaintiff as the person guilty of the offence, offered in evidence several anonymous letters, advertisements, &c., of a threatening and hostile import ; to the introduction of which the plaintiff objected, as stated by the bill of exceptions, because there was "no evidence that those papers were written by the plaintiff, by being in his hand writing, or otherwise." The Court overruled the objection, and admitted the evidence to go to the jury. The jury found a verdict for the defendant. The plaintiff moved the Circuit Court for a new trial ; which motion was overruled. The bill of exceptions does not profess to state all the evidence ; and we are left fairly to presume, that it was the intention of the plaintiff to state only so much of the testimony as would raise the question, whether the letters, &c., could, in any case, be admissible evidence, without proof that they were actually written by the plaintiff.

The first error assigned is the decision of the Court in admitting the letters, &c., as evidence ; and secondly, in overruling the plaintiff's motion for a new trial.

In considering the first assignment of error, it is necessary to premise that by the nineteenth section of the practice act, if either party, in the progress of a trial, shall allege any exception to the decision of the Court, and shall reduce the same to writing, the judge shall sign and seal the same. (1) By this act, it is apparent that the bill of exceptions is not to be considered as a writing of the judge, but is to be esteemed as a pleading of the party alleging the exception ; and if liable to the charge of ambiguity, uncertainty, or omission, it ought, like any other pleading, to be construed most strongly against the party who prepared it.

The appellant must be responsible for all uncertainty and omission in his bill of exceptions ; because he could, and ought, to

(1) R. L. 491 ; Gale's Stat. 533.

Greathouse v. Robinson.

have written out the evidence truly and according to the fact. As all the evidence has not been certified to this Court, and as the letters appear to have been objected to only because there was no proof that they were written by the appellant, we are left strongly to infer that there might have been evidence, of some other description, connecting the appellant with the writing or sending the letters, and thereby conducing to identify him, as the person who attempted the assassination proved. It might have been, for any thing that appears by the bill of exceptions, that the appellant caused the letters to be written; or, that they were written by some other person, but sent by the appellant. In fact, there might have been a great deal of minute circumstantial evidence, connecting the appellant with the sending of the letters, or putting up the advertisements, and which evidence would have been pertinent on the trial of the issue. There is nothing, therefore, to make it appear that the evidence was improperly admitted.

The second error brings into question the right of the plaintiff to a new trial. As all the evidence in this cause has not been certified to this Court, and as there is no such error in the proceedings of the Court below as would of itself entitle the plaintiff to a new trial, it is obvious that we have no means of judging upon the whole case submitted to the jury, whether or not, substantial justice has been done by the verdict. Where there is no error of the character alluded to, and the Court cannot see that injustice has been done, a new trial ought not to be granted. If it now fails to appear that injustice has been done, it is the fault of the plaintiff himself, in not stating, as he might have done, the whole of the testimony in his bill of exceptions. The party guilty of the omission must be the sufferer, and not the opposite party. For these reasons, the judgment of the Court below is affirmed with costs.

Judgment affirmed.

ISAAC GREATHOUSE, plaintiff in error, v. ROBERT L. ROBINSON, defendant in error.

Error to Hancock.

The defendant, to avail himself of a defective averment in a declaration, must demur to it. If he elects to plead to the declaration and go to trial, he has no right to insist upon the exclusion of evidence, because some necessary averment is omitted, or defectively set forth.

In a suit by petition and summons, the petition averred that the note described therein was endorsed as follows: "For value received, I assign the within note to Isaac Greathouse." The defendant pleaded *nil debet*, upon which issue was taken. The plaintiff offered in evidence the note described in the petition, with the foregoing assignment, and the name of the endorser annexed, "L. Allen Key." *Held*, that there was no variance.