EDWARD LILES, Appellant, vs. CHARLES BATAM, Appellee.

LRSC 4; 1 LLR 70 (1874)

[January Term, A. D. 1874.]

Appeal from the Court of Quarter Sessions and Common Pleas, Maryland County.

Returns to writs of summons—Change of venue.

1. Where no returns have been made by the proper officer to a writ of summons, it will be good ground for the dismissal of the declaration. A neglect to serve any original process, by which means only an action at law could be commenced, is a default which cannot be cured. The filing of an answer to a complaint will not bar the defendant from attacking the process wherein said answer a •general denial of the law and facts are pleaded.

2. The change of venue does not operate as an estoppel to any legal right or privilege of the defendant.

This is an action of trespass vi et armis, instituted in the Court of Quarter Sessions, Grand Bassa County, 71 June, 1873, by the appellee, Charles Batam (plaintiff in the court below), and was removed February, 1873, upon a change of venue, as provided for by the statutes, to the Court of Quarter Sessions of Maryland County for trial; and from which it is brought here upon a bill of exceptions for review.

This case presents many complications. This court, however, by the application of well-settled principles of law, has been enabled to unravel all of them and determine for whom judgment ought to be given. The statute declares that all actions except injunctions and replevins shall be commenced by a writ of summons directed to the sheriff, requiring him to summon the defendant to appear at a day appointed to answer the plaintiff's complaint. The writ, with the return of the sheriff endorsed thereon that he has summoned the defendant, is the evidence the law requires as proof that the defendant has been summoned; this not appearing upon the record in the case to have been done, the motion of the defendant in the court below to dismiss the action is well grounded, and therefore ought to have been sustained, and the court erred in ruling to the contrary. For it must be remembered that a neglect to serve any original process, by which means only an action of law could be commenced, is a default that cannot be cured by the application of any principles of law. And the court says it requires but very little exercise of mind to convince it of the fact that such a neglect as referred to differs vastly from a defect in the process itself, that may be cured by the appearance and answer of the defendant.

The court below ruled or decided that the defendant is estopped, by the oath he made for the change of venue, from his legal rights and privileges. Now if the construction placed upon the law providing for a change of venue by the court below was correct, the very object of its creation would be defeated, as must be plainly seen. For the intention of the Legislature in making the 72 law is to put a defendant in a position that would secure to him all legal privileges guaranteed by the Constitution; and to free him from the terror of a prejudiced verdict. Therefore an oath made for a change of venue does not subject the defendant to the law of estoppel in the sense it was rendered and determined by the court below.

It was also ruled by the court below that because the defendant answered the plaintiff's complaint, he, the defendant, could not question the legality of the process against him, though the law speaks quite to the contrary; for when the answer of the defendant denies both the law and the facts, he may raise any law question there-

upon.

The defendant was unlawfully carried to a trial by jury, because the action should have fallen upon the motion of the defendant to dismiss the case upon the ground that he was not summoned, as no proof appears upon the record to the contrary.

For reasons above stated this court is of the opinion that the rulings and decisions of the court below are erroneous, and that the judgment given in the case ought to be reversed.

The court therefore adjudges that the judgment given in this case in the Court of Quarter Sessions, Maryland County, at its May term, 1873, be and the same is hereby reversed, and made void and of no effect; and that the appellant, Edward Liles, recover from the appellee all costs incurred in this appeal.