HIXON *vs.* WEAVER AS ADR. USE, &C.

Where a judge refuses to sign a bill of exceptions, and it is signed by by-standers, and there is an endorsement upon it by the judge that he refused to permit it to be filed, but the record entry states that the court ordered it to be filed and made part of the record, the record entry must prevail over such endorsement upon the bill of exceptions, and no affidavits of the truth of such bill of exceptions are necessary.

This court will presume that by-standers signing a bill of exceptions are reputable persons, unless the opposite party objected to them, and made a showing to the contrary

By section 52, *chap.* 116 *Rev. Stat.* the defendant has until the calling of a cause in its regular order on the docket to file pleas to the merits, and the court cannot abridge the time allowed him, by a rule of practice.

Rules of practice made by the court must accord with statutary provisions.

Writ of Error to Crawford Circuit Court.

Assumpsit, by Weaver as administrator of Rose, use of Knox,

against Hixon, determined in the Crawford circuit court, at the August term, 1847, before the Hon. W. W. FLOYD, judge.

The suit was brought to the February term, 1847. At the return term, a demurrer was sustained to the declaration, and the case continued with leave to amend. On the second day of the following term (August 2d) the plaintiff filed an amended declaration. On the same day, it seems, the court made and entered of record a rule of practice that all pleas to actions should be filed on or before the fourth day of the term of the court, or in default thereof, judgment should be rendered for plaintiff upon the peremptory call of a cause. On the 6th day of the term, the defendant filed three pleas, two of the statute of limitations, and the third, *non assumpsit*. Afterwards, on the same day, and on the peremptory call of the cause, on motion of the plaintiff, the court ordered the pleas to be stricken from the record, and rendered final judgment for plaintiff, to which defendant excepted; and on the next day presented to the court a bill of exceptions, but the court refused to sign it, and endorsed thereon as a reason for his refusal, that it was not stated in the bill of exceptions that the court had made a rule requiring pleas to be filed on or before the fourth day of the term, &c.; and that defendant had not filed his pleas until after the fourth day of the term, and after the third calling of the cause. The defendant then procured three by-standers to sign the bill of exceptions. On the 9th day of the term, and two days after the bill of exceptions was signed, by the by-standers, the judge endorsed upon the bill of exceptions that he refused to permit it to be filed for the same reason that he refused to sign it. On the 11th day of the term, the following record entry was made: "The said defendant tendered his bill of exceptions in the above entitled case to the Hon. W. W. Floyd, judge, which his Honor refused to allow, sign and seal for the reason that a rule of this court, requiring pleas to be filed on or before the fourth day of the term of the court was not inserted therein, as is set forth by his Honor in his refusal endorsed on said bill of exceptions; and thereupon at the instance of said defendant three inhabitants of this

State, by-standers at the time the proceedings were had in the above entitled case, to wit: John P. Costa, Jesse Turner and Henry Wilcox, certified to and signed and sealed said bill of exceptions in accordance with the statute in such case made and provided; and thereupon said defendant presented said bill endorsed by his Honor as aforesaid, together with the certificate of the above named individuals, and requested that the same might be filed, and made a part of the record, which request is by the court here granted and the bill of exceptions, and the refusal, and reasons therefor, to sign the same by his Honor, together with said certificate, are accordingly filed and made a part of the record in this cause." Defendant brought error.

E. H. ENGLISH, for plaintiff. *Rev. Stat. Practice at Law, sec.* 107, provides that if a judge refuse to sign a bill of exceptions, it may be signed by three by-standers, and when so signed and *filed in court,* shall be a part of the record. The 108*th section* provides that if the judge refuse to permit a bill of exceptions signed by by-standers *to be filed,* the parties may take affidavits as to the truth thereof, &c.; and the 109*th section* provides that this court shall decide upon such affidavits as to the truth of the bill of exceptions, and whether it shall be a part of the record, &c.

Here the court did permit the bill of exceptions to be *filed and made part of the record,* so the record expressly states. True there is an endorsement by the judge, *dated* 9*th August,* that he refused to allow it filed, but a record entry *dated* 11*th August* says *he allowed it to be filed,* &c. No affidavits were therefore necessary, and this court will regard the bill of exceptions so signed by the by-standers, and filed by the order of the judge, as part of the record. Regarding it so, it shows that the court arbitrarily, and without cause, struck out the pleas of defendant filed before the *peremptory* calling of the cause, of which one was a plea of the general issue. This was erroneous. *Rev. Stat., chap.* 116, *sec.* 52.

BERTRAND, contra, argued that this court should disregard the bill of exceptions, because there were no affidavits taken to verify it. Also that there should have been some showing that the by-standers who signed it were reputable persons.

JOHNSON, C. J. The investigation of this case is narrowed down to one single point, and that is as to the propriety of the decision of the circuit court in striking out the pleas of the plaintiff in error. It appears from an entry in the record, that after the court refused to sign the bill of exceptions, it was signed by three by-standers, and that it was then permitted by the court to be filed and to form a part of the record. The bill of exceptions itself, shows a refusal of the judge to permit it to be filed, and as a reason for his refusal he certifies that the bill is untrue. Here then is a direct and palpable variance between the record entry and the bill of exceptions. The rule is well settled that, where the entries in the record are inconsistent with the statements contained in the bill of exceptions, the former shall prevail over the latter. Such being the rule, the certificate of the judge that he refused to permit the bill to be filed, must be disregarded, and the bill, as signed by the by-standers, must be received and considered as a part of the record in the cause. The bill as transcribed into the record, will therefore fall within the 107th sec. of chap. 116, which provides that, "If any judge shall refuse to sign a bill of exceptions, such bill may be signed by three by-standers, who are reputable inhabitants of the State, and the court shall permit such bill to be filed; and every bill of exceptions signed by the judge or by-standers, and filed in the court, shall form a part of the record in the cause in which the same may be filed." The statute requires that the by-standers, who sign the bill, shall be reputable inhabitants of the State. The defendant insists that the bill must show affirmatively that they are persons of good standing in society, and that in the absence of such showing the presumption of law is against them. We think that the converse of the proposition is true, and that if they are not reputable inhabitants of the

State it would devolve upon the opposite party to object at the time, and to show that they do not come within the description of persons contemplated by the statute.

It appears from the bill of exceptions signed by the by-standers, that at the peremptory calling of the case, the court, upon the motion of the defendant in error, struck out all the pleas which had been filed by the plaintiff. The 52d sec. of chap. 116 *Rev. Stat.* enacts that "Every plea to the merits shall be filed, where the writ has been served thirty days previous to the return day thereof, at or before the calling of the cause in its regular order on the docket, unless further time be given by the court for pleading, which shall in no case extend beyond the term." The pleas were in at the peremptory calling of the cause, which is all sufficient to answer the demands of the statute, and as a necessary consequence the court erred in striking them out. The reason assigned by the judge why he would not sign the bill, admitting that it is entitled to notice, under the state of the record, would not relieve it from the error complained of by the plaintiff. He refused to sign it upon the ground that it was untrue, in not stating that a rule of practice had been made by the court, by which all pleas were required to be filed on or before the fourth day of the term, and that said pleas were not filed until after the third calling of the cause and after the fourth day of the term. The circuit courts have the power to adopt rules of practice for the purpose of despatching the business that may come before them, but those rules must conform to the provisions of the statute, and not be so framed as to deprive either party of his legal rights. By the statute, the plaintiff had until the calling of the cause in its regular order on the docket to file his pleas to the merits. This right might have been extended to a longer, but could not be restricted to a shorter period. The court may by a rule prescribe the times when the docket shall be called for the purpose of deciding preliminary questions, and is not bound to wait until the cause shall be called for trial, but cannot require pleas to the merits to be filed on or before a particular day of the

term, whether the cause be called or not. So the facts stated by the judge for his refusal to sign the bill, upon the supposition that they are entitled to our consideration, would not have warranted the court in striking out the pleas. We think, from the whole showing, that the plaintiff was within the privilege of the statute, and that therefore his pleas were improperly stricken out. We are therefore of opinion that the judgment of the circuit court ought to be reversed and the cause remanded with instructions to restore the pleas to the record, and to permit the cause to progress. The judgment is therefore reversed and the cause remanded.