JESTER *vs.* HOPPER.

In a suit before a justice of the peace, where there is no valid summons, or service upon the defendant, if he appear on the return day, continue the case, direct a jury to be brought by the trial day, and finally appeal from the judgment of the justice, by such acts he becomes a party to the cause.

Where a party appealing from the judgment of a justice of the peace enters into a defective appeal recognizance, or the appeal recognizance is not sent up to the circuit court, the appellant cannot take advantage of his own omissions to dismiss the appeal—the appeal recognizance is given for the benefit of the appellee, and if he chose to waive objections to a defective one, or the want of one, the appellant cannot complain. So much of *Wolford & McKnight v. Harrington*, 2 *Ark. R.* 85, and *Poindexter v. Russell*, 6 *Eng. Rep.* 664, *contra*, overruled.

Although a discontinuance as to one defendant may be a discontinuance as to all, yet the remaining defendant should avail himself of such discontinuance, and if he does not do so, but proceeds to trial, the discontinuance as to him is waived.

In this case, John *Hopper* brought suit on a note before a justice of the peace payable to John *Harper*. HELD, That plaintiff might prove that the note was executed to him by a wrong name, and then read it in evidence.

Appeal from Hot Spring Circuit Court.

On the 27th February, 1849, John Hopper filed with Justice Neighbors, for suit, the following instrument:

"On or before the 25th day of December next, we, or either of us, promise to pay John Harper, or bearer, sixty-five dollars, for value received of him, as witness our hands and seals: this 23d August, 1848. JAHU JESTER,
JAMES SUMPTER."

A summons was issued against defendants, returnable on the 10th March, 1849. The summons was returned served on one of the defendants by a deputy constable, and on the other by the *Sheriff*. On the 10th of March, the return day, there was a judgment against the plaintiff for costs.

It does not appear any where in the proceedings, that the cause of action was ever filed again.

On the 10th March, 1849, however, a summons was issued, between the same parties, returnable on the 27th March, (which does not run in the name of the State,) and which was returned served on Jester, by a deputy constable.

On the 24th March, and before the return day of the former summons, another summons was issued, returnable the 14th April, 1849, which was returned served on both defendants by a deputy constable, who does not disclose the name of his principal. Nor does this summons run in the name of the State. The above facts are shown by the original papers returned to the circuit court by Justice Neighbors.

The transcript of the justice (as amended finally, after half dozen attempts to get it right,) shows that on the 14th April, the return day of the last summons, "defendants appeared before the court," and defendant Jester "objected to the constable," and applied for a continuance, to procure the attendance of a witness. The case was continued to the 9th June; at which time the defendants appeared, and again objected to the service of the writ, and moved the justice to dismiss the trial, but Justice Neighbors refused, "called the trial," and there was a verdict and judgment for plaintiff. The transcript states that the defendants prayed an appeal, which was granted, on condition that they comply with the statute, &c. That they perfected their appeal, by making the necessary affidavit, and entering into bond. It appears that Jester made the appeal affidavit. No recognizance appears in the record.

In the Circuit Court—At the appeal term, September, 1849. The parties appeared, by their attorneys, and plaintiff was granted leave to file an amended transcript, and the justice was permitted to mark filed the note sued on. The case was then continued, on the application of Hopper, the plaintiff, and judgment in favor of Jester and Sumpter, for costs of the term.

At the March term, 1850, Jester filed a motion to rule the plaintiff to give bond for costs, which motion was sustained, and a bond filed payable to Jester and Sumpter. On motion of defendants, rule on justice to amend his transcript.

At the September term, 1850—Justice Neighbors was again required to amend his transcript, on motion of the plaintiff.

Defendants then moved to dismiss the case for want of jurisdiction on the ground that they were not legally served with process, and made no appearance to the action before the justice. The court overruled this motion, and, upon the suggestion of the court in delivering its opinion upon the motion, the plaintiff elected to discontinue his suit as to defendant Sumpter, and proceed against Jester alone.

On motion of defendant's counsel, it was ordered that the imperfect and incorrect transcripts filed by the justice, be stricken from the files, and that the cause proceed on the amended transcript filed at that term.

Neither party requiring a jury, the case was then submitted to the court, sitting as a jury, and there was a finding and judgment in favor of the plaintiff against Jester.

Jester took a bill of exceptions, excepting to the discontinuance as to Sumpter, the admission of the note copied above as evidence on the trial, and the admission of parol evidence to show that it was in point of fact executed to plaintiff John *Hopper,* though it imported on its face to be executed to John *Harper.* Jester appealed.

E. H. ENGLISH, for the appellant. The judgment rendered on the 10th of March was either a final judgment, in which case it was a bar to any further action; or it was a non-suit, in which case it was necessary to file the cause of action on bringing a new suit, and this not being done the cause should have been dismissed for want of jurisdiction in the justice.

The writs of summons were void, not running in the name of the State. (*Rhae Ex parte,* 5 *Ark.* 104.) There was no legal notice to the defendants, the service of the summons being by a deputy, who did not disclose the name of his principal, (1 *Eng.* 396); and no appearance by the defendant; the cause should therefore have been dismissed for want of jurisdiction of the person of the appellant.

The prayer for an appeal did not constitute an appearance, nor give the circuit court jurisdiction, because the appeal was not perfected, the appellants not having entered into recognizance; the appeal then should have been dismissed. 2 *Ark.* 85. 6 *Eng. Rep.* 665.

But if the cause and the parties were legally in court, the discontinuance as to Sumpter was a discontinuance as to both parties. 4 *Ark.* 509. *Ib.* 517. *Ib.* 598. 1 *Eng.* 92.

JORDAN, contra. The transcript of the justice shows that the note sued on was actually filed; and it is not therefore necessary that the note be marked filed. (*Camp et al. v. Gullett & wife,* 2 *Eng.* 524.)

It is admitted that the orginal summons was void and the return of service illegal, and that the defendants were not bound to appear. Jester, however, made himself a party by filing an affidavit for continuance, praying and perfecting an appeal.

Sumpter did not appear, and the suit was properly discontinued as to him; but even if he had appeared, Jester waived all objection to the discontinuance by subsequent acts in the circuit court.

Mr. Justice SCOTT delivered the opinion of the Court.

Although this is a voluminous record, and the counsel have discussed no small number of questions, in the various attitudes that they have felt compelled to view the case in its serpentine course through the two lower courts, we think the whole matter is within a small compass.

Without regard to the questions of filing and re-filing which, in the view we take of the case, are in no way involved, the note was certainly filed on the 27th February, 1849. And then conceding that there never was any valid process to bring either of the defendants before the justice, still the defendant, Jester, in April, upon his affidavit of the materiality of the testimony of an absent witness, obtained a continuance of the cause, and at the same time required the justice to issue process to bring in a

jury to the latter time. And afterwards, when that day of trial arrived, although in the language of the justice's transcript, he "objected to the service of the writs, and moved the court to dismiss the trial," which the court "overruled and called the trial," nevertheless after the jury had given their verdict and the court rendered its judgment, he prayed an appeal, which the justice "granted upon condition that they would comply with the statute in such case made and provided:" and the transcript goes on to say, "and on the same day comes the defendants, and perfects their appeal by making the necessary affidavits and entering into bond with good and sufficient security, which is hereby approved by the justice." The only irregularity in this entry, as shown upon its face, is that the word *bond* and not *recognizance* appears, but it cannot be easily supposed, when the whole is taken together, that the justice meant any thing else than the latter, which is nothing more or less than a bond in the more enlarged sense of that term.

But however this may be, such an objection cannot be heard from Jester the appellant, as a reason for getting clear of his own appeal; because, whether bond or recognizance, or other irregularity of like kind, it was not executed for his benefit or advantage, but for that of his adversary who might, if he chose, waive either that or any other regulation designed exclusively for his own benefit, security or safety. (*Wilson v. Dean,* 5 *Eng. Rep.* 309. *Dig., p.* 666, *sec.* 174, 176.) The case of *Poindexter v. Russell,* 6 *Eng.* 665, and other like cases, so far as they conflict with this doctrine, are overruled.

Thus the party, Jester, was by his own voluntary act regularly in the circuit court with his appeal. And in that court, although it might be conceded that the discontinuance, as to his co-defendant, Sumpter, might have been made available to him as a discontinuance of the whole action, yet the record shows that he was not disposed to avail himself of that advantage; but, on the contrary, he waived it by the affirmative act on his part of moving the court afterwards to strike the several imperfect transcripts from the files of the court, and to proceed with the cause on the

last amended transcript from the justice. (*Hanley v. Real Estate Bank,* 4 *Ark. Rep.* 598.) The court did proceed, and during the hearing the party, Jester, seems not to have been an inactive spectator, but excepted to the introduction of testimony, as is shown by his bill of exceptions.

The testimony excepted to was unquestionably competent and relevant to sustain the allegation made *ore tenus,* that the note in question was executed to *John Hopper,* the plaintiff below, by the name and description of *John Harper,* and thus enable him to read it in evidence.

Finding then no substantial error in the record, although surcharged with the name of Sumpter, and various informal process and proceedings, the judgment must be affirmed.