RUTHERFORD *v.* MOODY.

Opinion delivered June 23, 1894.

1. *Process—Service by attorney.*
A service of a summons by plaintiff's attorney is bad.

2. *Appearance—Tender and payment into court.*
Where, upon quashal of the service of summons, defendant tendered to plaintiff the amount due, and, upon his refusal to re-

ceive it, paid the amount into court, his acts will not be construed to constitute an appearance to the action, where it is not shown that such was his intention.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Jo Johnson, of counsel for appellant.

1. A summons may be served by an officer or *person* authorized by law to serve process. Mansf. Dig. sec. 4037. Thos. E. Ward was not "a party to the action." *Ib.* 4975 and clause 3. The practice in circuit court is followed in justices' courts. *Ib.* ch. 91, sec. 4034; 37 Ark. 450; Dig. secs. 4975, 4038. An appointment by the justice was not necessary. *Ib.* sec. 4975. Serving summons by the *plaintiff* is a mere *irregularity,* to be taken advantage of *before* judgment—not after. 17 How. 347.

2. But Moody *appeared,* and tendered the money to plaintiff. This was sufficient. 1 Ark. 384.

HUGHES, J. The appellant sued the appellee before a justice of the peace, and the summons issued by the justice was served by the appellant's attorney. Moody moved to quash the service upon him, because made by appellant's attorney. The motion was sustained, and thereupon the cause was dismissed as to Moody, who then tendered to the appellant the amount of his debt, which appellant refused to receive, which Moody thereupon paid into court. The appellant appealed to circuit court, where appellee renewed the motion to quash, which was sustained, and he appealed to this court.

The service of process, in a suit, should be made by an indifferent person, and not by a party, or one interested in the suit, as attorney, or

1. Service of process by attorney.

otherwise. Weeks on Attorneys, sec. 122; *Ingraham* v. *Leland,* 19 Vt. 304; *White* v. *Haffaker,* 27 Ill. 349.

2. As to appearance.

There does not appear to have been any intention upon the part of appellant to appear in the action, and his tender and subsequent payment of the debt into court was not an appearance to the action.

The judgment is affirmed.