

**JAMES S. SMITH, Appellant, vs. FENTON ANN HILL, O. G. R. HILL, and
THOMAS L. HILL, Appellees.**

LRSC 2; 1 LLR 514

[January Term, A. D. 1882.]

Before His Honor C. L. Parsons, Chief Justice, and the Honorable Associate Justices.

MOTION TO DISMISS APPEAL.

The appellees in the above entitled cause respectfully motion this honorable court to dismiss the said case and rule the said appellant to pay all costs, because,—

First, the said appellees have not all been cited to appear before this honorable court to defend this case, in the manner prescribed by law.

Second, and also because the whole costs accruing in this case in the court below have not been paid by the appellant to the said appellees.

Third, And also because the bill of exceptions filed in this case is not framed according to the law and the rules of this court, in that the said bill of exceptions does not clearly and distinctly set forth such of the rulings or decisions of the court below or such parts of said rulings or decisions as the appellant excepts to.

Fourth, and also because the said appellant, not having made a motion in the court below to set aside the verdict of the jury, or filed exceptions to the final judgment founded on said verdict, the said appellant has waived his right to question the correctness of said verdict and the justice of said final judgment which is founded thereon. All of which said appellees are ready to prove. Wherefore they pray the dismissal of said case with costs, as above stated.

FENTON ANN HILL, O. G. R. HILL, and THOMAS S. HILL, Appellees, By their Counsellors, H. W. JOHNSON, JR., and HY. W. GRIMES.

COURT'S RULING.

After reviewing the grounds set forth in appellees' motion to dismiss this cause, the court is of opinion that where an appellant appeals from any decision rendered in a court below in favor of joint suitors, whether plaintiffs or defendants, the non-summoning of each individual of the said joint suitors to appear and answer the appeal, as appellees, is not fatal to the appeal. If one of said joint suitors has been summoned, it is sufficient notice to all, especially when one of the joint suitors in the court below appears in the court where the appeal is taken, and does an act which raises the presumption that said act was done by and with the consent and authority of the other joint appellees, as in this case, where the appellee, Fenton Ann Hill, makes affidavit to, and signs, the motion tendered this court to dismiss the case. And it is just for this court to conclude that her signing the motion referred to was to secure that advantage to all the appellees, and in doing so she acted by and with the consent and authority of the whole. Just here we would remark that without this view taken by the court the failure of each of the appellees to sign the motion tendered, to dismiss, would be equally as fatal as the non-summoning of each appellee, and consequently could not be countenanced by this court.

Second, this court is of the opinion that the question referring to costs ought to have been raised and settled in the court below, or before the judge thereof. This court is authorized to examine matters in dispute upon the record only, therefore it can notice no question to which the attention of the court below does not

appear to have been called by the bill of exceptions or other records; and this court is of opinion that the court below would not grant an appeal before the law has been complied with, and until the contrary appears on the record this court must regard the plea, in this particular, insufficient to support the motion.

Thirdly, in the examination of the bill of exceptions it is obvious that the opinions and statements therein made and cited respecting certain rulings said to have been made by the court below, tend to lead the mind of this court into a state of conjecture as to whether the court below proceeded in the trial of the case contrary to the plain principles of law and justice. The opinions and statements referred to signify that the court below maintained an opinion opposite to those stated in the bill of exceptions, and the fact that the bill of exceptions bears the signature of the judge of the court below leaves this court in a state of conjecture.

Fourthly and lastly, this court is of opinion that appellees had the right to except to the court below granting the appeal to the appellant at the stage of the case referred to. Such being contrary to legal practice, the neglect of appellees to do so amounts to a waiver of that right, and they cannot now set up any objection to the manner in which the appellant has obtained his appeal.

Therefore, in order to do justice to the parties concerned, and to keep good conscience, it is necessary to try the merits of the case, so as to enable this court to determine questions which the plea in appellees' motion has drawn under our consideration. The court will therefore make no further expression on this point before the merits of the case shall have been heard. Appellees' motion is therefore not sustained.

Supreme Court, 19th January, 1882.

Key Description: Appeal and Error (As part of record, in general, Bill of exceptions, case, or statement; Bill of Exceptions; conclusiveness of record; Waiver of objections to right of appeal)