

## STATE v. JACOB BENTON.

Where the Supreme Court, at a trial term, continue a criminal case with an order that the respondent, who has been committed to jail, shall recognize in the sum of two hundred dollars, the clerk may take the recognizance after the term of court is over.

Upon *scire facias*, it was held that the only surety in a criminal recognizance is bound, although the statute requires two sureties.

SCIRE FACIAS on a recognizance. For the purpose of raising questions of law, the following facts were agreed to, viz :

That at the April term of the Supreme Judicial Court, A. D. 1864, one C. O. Burbank was indicted for receiving stolen goods, and being committed to jail in said county, the cause was continued with an order which is entered in these words and figures : " Defendant to recognize in \$200."

After the court had adjourned for said term, D. C. Pinkham, who was clerk of said court, and a justice of the peace for said county, but who had no other authority than as such clerk and justice of the peace, took the recognizance of said Burbank and the defendant, in the said sum of \$200.

*Heywood* for State.

*J. H. Benton, Jr.*, for defendant.

SMITH, J. It is believed to have been the general practice in this State, where orders have been made in court, fixing the amount of a recognizance, for the clerk to take the recognizance after the final adjournment, if none was entered into during the session of the court. The order now in question must be construed, in view of the existing practice, as giving the clerk authority to take the recognizance in vacation.

The objection that the statute requires two sureties cannot avail to discharge from liability the single surety who voluntarily entered into the recognizance without a co-surety. If the State had refused to accept a recognizance with only one surety, the statute would have justified that refusal; see *State v. White*, 41 N. H. 194; *Gilman v. Bartlett*, 20 N. H. 168. But the State make no objection; on the contrary, they seek to enforce the recognizance. The law requiring two sureties was not enacted for the benefit of respondents or sureties, but for the security of the State; and, although there was an omission on the part of the State officials to insist on a compliance with the statute, this surety cannot make their misconduct in not requiring additional security a reason for depriving the State of the security which was given. Individuals, in many instances, are allowed to waive statute requirements enacted for their own benefit, (see *Farnam v. Davis*, 32 N. H. 302; *Dickey v. Livermore*, 34 N. H. 199); and it seems reasonable in a case like the present that the State should have the same privilege. So far as the surety is concerned, the giving of the recog-

nizance was not a compulsory, but a voluntary, proceeding. It is not for the surety, "thus voluntarily appearing, to object to what was done;" see Bell, C. J., in *State v. Eastman*, 42 N. H. 265, p. 273-4.

*State v. Buffum*, 22 N. H. 267, cited by defendant, is not precisely in point; if it were, the grounds of that decision might require re-examination.

*Case discharged.*