FLOYD *vs.* THE STATE.

On an indictment for false imprisonment, the State is only required to prove the imprisonment, and then it devolves upon the defendant to prove that he was justified in what he did, and that the imprisonment was lawful.

Every confinement of a person is an imprisonment, whether it be in a common prison, in a private house, in the stocks, or even by forcibly detaining one in the public streets.

The defendant must either prove that he did not imprison the party, or he must justify the imprisonment.

Defendant may justify, by showing that he procured the arrest to be made under and by virtue of a regular and valid warrant.

Under our statute (*Digest, chap.* 52, *sec.* 21,) the offence charged against the party arrested, should be set out in the warrant, though this was not required by the common law. Where the defendant relies upon proof of its contents, instead of producing the warrant, the State not objecting to secondary evidence, he should show that it was a legal and valid warrant—at least that it ran in the name of the State.

Though defendant may not be present when the arrest is made, yet if it be done upon his procurement, he is answerable therefor.

Where there is a conflict of evidence as to whether the party was imprisoned against his will, it is the province of the jury to determine the weight of evidence, and their verdict is conclusive.

APPEAL FROM OUACHITA CIRCUIT COURT.

The appellant, Andrew J. Floyd, was indicted, with others, in the Ouachita Circuit Court, for false imprisonment, and tried before Hon. JOSIAH GOULD, then one of the Circuit Judges, in October, 1849.

The indictment charged that Isaac Franklin, Nelson Mitchell, Henry Nelson, William H. Moffitt, *Andrew J. Floyd,* and James M. Floyd, on the 20th day of October, A. D. 1848, with force and arms, at, &c., in and upon one Charles Cook, in the peace, &c., did make an assault, and him, the said Charles Cook, did then and

there, beat, wound and ill-treat, &c., and him, the said Charles Cook, then and there unlawfully and injuriously, against the will, and without the consent of him, the said Charles Cook, and also against the laws of the State, without any legal warrant, authority or justifiable cause whatsoever, did imprison, confine and detain, for a long time, *to-wit:* for the space of three days, then next following, and other wrongs, &c., to the damage, &c., against peace," &c.

A motion to quash the indictment was made, and overruled. Defendants offered to file special pleas in justification, which the court rejected, on motion of the attorney for the State, and the defendants excepted. Defendants then standing mute, the plea of not guilty was entered for them by order of the court; Andrew J. Floyd severed, was tried by a jury, found guilty, and fined one hundred dollars. He moved for a new trial, on the grounds that the verdict of the jury was contrary to the evidence, the law, and the instructions of the court. The motion was overruled, and he took a bill of exceptions setting out the evidence, &c.

The bill of exceptions states that, on the trial, it was proven that, on the 20th day of Oct., 1848, Charles Cook was arrested by Isaac Franklin, aided by some other persons, in Franklin township, Ouachita county, and taken before John Hanna, a justice of the peace of said township. That the arrest was made under a process of some kind from said justice, ordering Cook's body to be taken. This was stated by a witness for the State, but the original process was not produced on the trial by either party. One of the witnesses for the State testified, that defendant was some two or three hundred yards from the place where Cook was arrested, at the time of the arrest; and that when Cook was brought by Franklin and others to where defendant was, he said nothing to Cook, but got on his horse and rode on behind Cook, and those who had him in custody, until they all arrived at the house of the justice. A trial was there had before the justice, and Cook was committed. The process of commitment was read to the jury, and is copied in the bill of exceptions. It directs Cook to be confined in jail until he gave bond for his appearance

at the next Circuit Court of the county, on a charge of removing corn from the premises of James M. and A. J. Floyd, after being forbidden to do so; and recites that he was committed on the affidavits of James M. and A. J. Floyd, and the testimony of other persons. There being no constable in the township, Isaac Franklin was specially authorized, by endorsement of the justice upon the mittimus, to execute it.

Another witness testified, that defendant had a gun, and that he said he was having Cook arrested to get his (defendant's) corn, and that his object was to get his rights. Same witness testified Cook was arrested at the instance of defendant.

One of the witnesses for defendant testified that he was summoned by Isaac Franklin to aid in the arrest of Cook, and that Cook said, at the time he was arrested, it was just what he wanted, and was willing to go, and went on. The defendant was some distance behind, and witness saw him do nothing. Franklin and witness took Cook to the house of the justice, and defendant neither did or said anything during the trial.

The witnesses both for the State and defendant, testified that defendant did not assist in the arrest or detention of Cook, neither before nor after the trial before the justice.

Another witness testified, that Cook was stacking fodder at the time of his arrest, and said he wanted them to wait until he was done, but Franklin said he could not wait; Cook said he would not resist the process, and immediately came out of the field, and went with them.

Defendant asked the court to instruct the jury, "that if Cook went willingly, it is no false imprisonment," but the court refused so to give such instruction, and defendant excepted.

But the court instructed the jury as follows: "If the jury believe Cook went willingly, and would not have been compelled to go, if he had gone willingly, it is no false imprisonment: but the manner of arrest, be what it may, if the jury believe that Cook had laid a plan to get himself arrested, in order to render the persons arresting him liable, it is no false imprisonment."

PIKE & CUMMINS, for the appellant, submitted, 1st. That, if this indictment can be sustained at all, where a party proceeded by procuring a legal warrant, yet, in this case, the facts did not warrant a conviction: and 2d. That, even if there were both malice and want of probable cause, the indictment cannot be sustained.

The law always insures to a public prosecutor all due protection, and he cannot be sued, much less indicted, unless his proceedings were actuated by malice and destitute of any probable foundation. *Pencel v. McNamara,* 1 *Camp.* 199. *S. C.,* 9 *East* 361. *Salk.* 13. *Ld. Raym.* 374. 5 *Taunt.* 187.

That the process procured by Floyd, not being *void,* but only irregular and erroneous, there was and could be no trespass, and being no trespass, there was no assault and battery or false imprisonment; that if the process was without probable cause and from malice, he may be sued in case or indicted for conspiracy, but not indicted for false imprisonment: so where the arrest was under a warrant. 1 *Ch. Cr. Law* 19. 3 *T. R.* 185. 3 *Ersp.* 166. *Boote v. Cooper,* 1 *T. R.* 535. *Arbuckle v. Taylor,* 3 *Dew.* 160. *Morris v. Cerson.* 7 *Cowen* 234. *Ulmer v. Leland,* 1 *Greenl.* 135. *Cameron v. Lightfoot,* 2 *W. Bla.* 1192. *Wood v. Kinsman,* 5 *Vern.* 588. *More v. Chapman,* 3 *Hen. & Munf.* 264. 9 *Conn.* 140. 2 *Dev.* 370. 4 *Day* 257. *Taylor v. Alexander,* 6 *Hamm.* 144. *Beaty v. Perkins,* 6 *Wend.* 382.

It devolved on the State to show malice, and the want of probable cause. She failed to prove either. It appeared that the arrest was made on a warrant from the justice, of which there was secondary evidence, without objection on the part of the State, that proof was made to the satisfaction of the justice. And it would be doing great injury to the cause of law to punish a man under such a state of case. The appellant only did what every good citizen was bound to do.

CLENDENIN, *Att'y Genl., contra.* All that the prosecution has to prove is the imprisonment. It is for the defendant to show that he was justified, and that the imprisonment was lawful.

Arch. Crim. Plead. 364. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public street. *Com. Dig., Imprisonment G.*

False imprisonment is the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. *Dig. Ark., Ch.* 51, *Art.* 7, *Sec.* 1.

Mr. Chief Justice JOHNSON delivered the opinion of the Court:

This is a prosecution for false imprisonment. In order to establish this offence on the part of the State, she is only required to show the imprisonment, and when that is done, it devolves upon the defendant to prove that he was justified in what he did, and that the imprisonment was lawful. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. *Arch. Cr. L.* 471. *2 Inst.* 589. *Cro. Car.* 210. *Com. Dig., Imprisonment.* The defendant must either prove that he did not imprison the party, or we must justify the imprisonment. *Arch. Cr. L.* 471. The argument of the defendant's counsel is, that, inasmuch as trespass will not lie against a party who sues out a regular and valid process, and that as false imprisonment includes a trespass, that therefore false imprisonment cannot be maintained under like circumstances. That the doctrine contended for is correct as a general and abstract proposition, we will not at this time controvert; but the question here to be determined is, whether such a state of fact is shown to exist as to make a parallel case, and consequently to warrant the conclusion attempted to be drawn. The charge is that the defendant did the act complained of without any legal warrant, authority or justifiable cause. If he has shown, upon the trial in the court below, that he procured the arrest to be made under and by virtue of a regular and valid warrant, we think he has fully answered the charge preferred against him, and that consequently he stands justified in the eye of the law; but if, on the contrary, he has failed to show any legal warrant, authority or reasonable

or justifiable cause whatsoever for the act, it is clear that the defence of justification is not made out, and that as a matter of course the conviction is right.

It is contended that the law does not absolutely require that the charge should be set out in the warrant of arrest. This was true at the common law, but is not so since the passage of our statute. The 21st *Sec.* of *Chap.* 52 of the *Digest* enacts that, "If it shall appear, on such examination, that any criminal offence has been committed, such officer shall forthwith issue a proper warrant, reciting the acquisition and commanding the officer to whom it shall be directed to take the accused without delay and bring him before such officer to be dealt with according to law."

The principle that secondary evidence, if not objected to at the time, is competent to go to the jury and that it is too late to object for the first time in the appellate court, is a familiar one and will not be disputed. But the question here recurs whether, admitting the whole testimony to be technically competent and legal, it discloses a regular and valid warrant. The substance of the testimony bearing upon this part of the case is, that the special constable arrested Cook under a "process of some kind" which had been issued by a justice of the peace, that the process commanded the officer to take the body, that the arrest was made in the same township in which it was issued, and that the defendant said he was having him arrested to get his rights. Do these facts show that Cook was arrested under a legal warrant? We think not. It is clear that as the defendant did not offer the warrant itself, but relied alone upon a showing of its contents, he should at least have made it appear that it ran in the name of the State. It may have been "some kind of process," and yet utterly deficient in some of the essential requisites of a valid writ. If he had attempted to justify under the warrant itself, and had offered the warrant in evidence, he most assuredly would have been held to the production of one legal and valid upon its face; and if so, it is manifest that he could not be excused from a similar showing when he rested and relied upon its contents, and that no presumption could obtain in favor of the

latter that would not equally hold in respect to the former. From this view of the testimony, we consider it clear that the arrest was made without any legal warrant, and this being the case, the conclusion drawn from a supposed different state of fact, cannot be upheld. The defendant did not attempt to justify under any other authority, nor did he pretend that such a state of case existed as would have authorized him to do the act of his own accord and without a warrant. It is true that from the testimony it appears the defendant was not actually present when the arrest was made, yet, as he first put the law in motion, and was mainly instrumental in causing the act to be done, we consider him legally liable for the consequences. We have thus disposed of all the questions made by the motion for a new trial, which relate to the law and the testimony.

The next and last relates to the finding as squaring with the instruction of the court. The instruction is, "If the jury believe Cook went willingly, and would not have been compelled to go if he had not went willingly, it is no false imprisonment; but the manner of the arrest be what it may, if the jury believe that Cook had laid a plan to get himself arrested in order to render the persons arresting him liable, it is no false imprisonment." The verdict is not believed to be at war with this instruction. It is true that there is some conflict in the evidence in respect to the willingness of Cook to go with the officer, and that conflict the jury were perfectly competent to settle and adjust. This they have done and found, as they had the right to do, that he was carried against his will. We are, therefore, of opinion that, from the whole showing of record, the court below committed no error in refusing a new trial, and that consequently its judgment ought to be affirmed. It is, therefore, considered and adjudged that the judgment of the Circuit Court of Ouachita county, herein rendered, be, and the same is hereby, in all things, affirmed.