## SHROPSHIRE *vs.* THE STATE.

In a criminal case, after plea of not guilty, and verdict, defendant cannot interpose the objection that the grand jury by whom the indictment was found was composed of a greater number than that prescribed by law: the objection should be reached by plea in abatement. Such objection, however, does not exist, in point of fact, in this case.

In this case, the record shows that, at the term at which the indictment purports to have been found, sundry indictments were returned into Court by the grand jury and filed, but there is no record entry showing that this particular indictment was so returned, and the defendant, being convicted, urges this as a ground of error: HELD: That, inasmuch as our statute, (*sec.* 86, *ch.* 52, *Dig.*,) forbids such an entry, except in case where the defendant is in custody, or on bail, the objection was untenable here.

The record shows that, at the time the indictment was found, *A. B. Greenwood* was prosecuting attorney, and that when the case was tried, *A. B. Greenwood* presided as judge, but the record does not show that any objection was made to the competency of the judge, nor is there any proof of record that Judge *Greenwood*, and the prosecuting attorney *Greenwood*, were the same person. It was urged, on appeal, by the defendant, as grounds of reversal, that the judge was incompetent to

try the case, having acted as prosecuting attorney when the indictment was preferred—and that this Court judicially knew that the same person filled said offices respectively at the times referred to. But this objection is overruled, on the grounds that though this Court might take judicial notice that *A. B. Greenwood* was prosecuting attorney when the indictment was found, and that *A. B. Greenwood* was Circuit Judge when the case was tried, yet it could have no judicial knowledge that the prosecuting attorney and the judge were the same person—and. it is further held, that defendant, in some mode, should have objected to the competency of the judge at the trial, and put the evidence of his incompetency of record.

The defendant was convicted of murder in the first degree, and claimed a new trial, on the grounds that the verdict was contrary to law and evidence. This Court, after reviewing, and duly considering the evidence, refuses to disturb the verdict, holding it to be well warranted by the evidence.

*Appeal from Carroll Circuit Court.*

Indictment for murder. The transcript shows the following state of facts:

"At a Circuit Court began and held at the court-house in the town of Carrollton, in the county of Carroll, State of Arkansas, on the first Monday in May, 1846, it being the fourth day of said month, present, the Hon. SEABORN G. SNEED, Judge, the following proceedings were had: *to wit*:

"This day came the sheriff of said county, and returned into Court here, the following list of Grand Jurors, *to wit*: Jacob A. Meek, Jeremiah T. Meek, John Campbell, Dennis Lewis, Wm. H. Wilson, Nathaniel Rudd, William Wood, William Plumley, John Boyd, William May, Seth Wade, Beal Gather, Henry McMillan, George Rowland, and Mathew Bristow, *sixteen* good and lawful men of said county, freeholders or householders thereof; and the said John Campbell, William Wood, Nathaniel Rudd and George Rowland, having failed to appear; ordered by the Court, and in accordance with said order, the sheriff returned into Court here Jonathan Dunlap, George Suggs, James T. Officer, John Dunlap and Arthur B. Baker, instead of the said absentees aforesaid, which said persons being citizens and householders or

freeholders, present and duly returned as aforesaid, having been duly sworn, with Beal Gather as foreman, in terms of the law, first being empannelled, were charged touching their duties, retired to consider thereof, in charge of the sheriff.

"Ordered that Court adjourn until to-morrow morning, 8 o'clock.

"Tuesday morning, May the 5th. Court met pursuant to adjournment, present Hon. S. G. SNEED, Judge.

"And on this day these further proceedings were had, *to wit*: The grand jury came into Court, and filed here divers bills of indictments; and two of their body were discharged for inability to serve, (George Suggs and Jacob A. Meek,) and Smith S. Matlock and Garrett Green, were summoned instead: who were sworn in terms of law, retired in *conjunction with that body to consider of their duties.*

"Ordered that Court adjourn until to-morrow morning, 8 o'clock.

"Wednesday morning, May 6th. Court met pursuant to adjournment, present, as on yesterday. When these further proceedings were had: Came the grand jury, and having no further business, were discharged, after depositing various bills of indictments.

"Ordered that Court adjourn until court in course."

"At a Circuit Court which was begun and held at the courthouse, &c., in the county of Carroll, &c., on the sixth Monday after the fourth Monday in *February, A. D.* 1851, it being the 7th day of April, when present and presiding, the Hon ALFRED B. GREENWOOD, as Judge of said Court, the following proceedings were had, *to-wit:* Ordered by the Court, that Court adjourn until to-morrow morning, 9 o'clock. A. B. GREENWOOD, Judge.

"Tuesday morning, 9 o'clock, April 8th. Court met pursuant to adjournment. And on this day these further proceedings were had, to *wit*:

STATE OF ARKANSAS,<br>
COUNTY OF CARROLL.

*In the Circuit Court of said county of Carroll, and to the May term thereof, A. D.* 1846.

The Grand Jurors for the State of Arkansas, duly selected,

summoned, returned, tried, empannelled, sworn and charged to inquire in, and for the body of the county of Carroll aforesaid, upon their oath, present that JAMES SHROPSHIRE, not having the fear of God before his eyes, but being moved and seduced by the instigation of the *Devil,* on the 1st day of March, A. D. 1846, with force and arms, in the county of Carroll aforesaid, in and upon one LEWIS WILLIAMS, in the peace of God and the State of Arkansas, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said James Shropshire, a certain rifle gun of the value of ten dollars, then and there loaded and charged with gunpowder, and one leaden bullet, which rifle gun, he, the said James Shropshire, in both his hands, then and there had and held to, against and upon the said Lewis Williams, then and there feloniously, willfully and of his malice aforethought, did shoot and discharge, and that the said James Shropshire, with the leaden bullet aforesaid, out of the rifle gun aforesaid, then and there, by force of the gun powder shot and sent forth as aforesaid, the said Lewis Williams, in and upon the left side of the back bone of him, the said Lewis Williams, then and there feloniously, willfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said Lewis Williams, then and there, with the leaden bullet aforesaid, so as aforesaid shot, discharged and sent forth out of the rifle gun aforesaid, by the said James Shropshire, in and upon the left side of the back bone of him, the said Lewis Williams, one mortal wound of the depth of ten inches, and of the breadth of one inch, of which said mortal wound, the said Lewis Williams, on the said first day of March, in the year aforesaid, in the county aforesaid, instantly died: and so the jurors aforesaid, upon their oath aforesaid do say that the said James Shropshire, the said Lewis Williams, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State of Arkansas.

A. B. GREENWOOD, *Pros. Att.*
*for 4th Jud'l Cir't., State of Ark.*

"And upon the said indictment are the following endorsements:

STATE OF ARKANSAS,
vs.
JAMES SHROPSHIRE
} *Murder.*

A true bill: BEAL GATHER, *Foreman of the Grand Jury.*

Filed, this 6th day of May, 1846.

J. A. HICK, *Clerk.*

The record then shows that defendant, Shropshire, having been served with a copy of the indictment, was brought into Court, arraigned, pleaded not guilty, tried by a jury, and a verdict returned against him for murder in the first degree, Hon. A. B. GREENWOOD, presiding as Judge.

The record does not show that any objection to the competency of the judge was made, or that it was waived—the record is silent on this subject.

The counsel for Shropshire moved for a new trial on the grounds that the verdict was contrary to law and evidence, which was overruled, and he excepted, and took a bill of exceptions, setting out the evidence.

Sentence of death was pronounced against Shropshire by the court, but, he appealing, the judgment was stayed until the opinion of this court could be taken.

The following testimony was introduced upon the trial, as set out in the bill of exceptions:

*Smith S. Matlock,* witness for the State, testified: I was acquainted with Lewis Williams in his life-time. I examined him after he was dead: this was in the month of March, 1846. Deceased was lying on his face, rather on his right side. I went from this to where I supposed he had received the shot. The bullet appeared to have passed in through the lower part of the shoulder blade, and came out on the front and lower part of the neck, and on the opposite side thereof. This was all the wound I saw. This took place in Carroll county. We supposed that it was about 19 steps from where the person appeared to have

stood, whom we supposed shot deceased, to where deceased was when shot. There was snow on the ground; all the tracks of the deceased, and of the person that shot him, were plain to be seen. It is about seventy-five yards from the deceased's house to the place where the shooting seemed to have taken place; and the tracks of the deceased, and of the person whom I supposed shot him, came from the direction of the house, but not one after the other, or upon the same ground. The way deceased ran after he was shot, was directly from the house, and towards a path that led to the nearest settlement, and fell dead after he had run about 150 yards. From the tracks, it seemed that deceased had been behind the crib near which he was shot. He seemed to have walked about fifteen steps from the crib, and stopped where we supposed he was shot. From this place he seemed to have run; and in about two or three steps, I saw the first blood. The ground was nearly level at this place. In retracing the steps of deceased, I saw a rock on the way that looked like it had been dropped in the snow—it would have weighed two pounds. The footsteps of the person that appeared to have shot deceased did not come directly toward the crib, but came within fifteen or twenty steps, and turned back, and seemed to follow tracks of deceased until he shot. The deceased had no weapon about his person when found. He was in his shirt sleeves, and had his sleeves rolled up. I don't know who shot him.

The State introduced two other witnesses, (Samuel Carus and L. Allred,) who proved substantially the same facts, and also that the snow fell on the Friday night previous to the killing.

*Robert Dawson,* witness for the State, testified, that he was the first man that got to deceased after he was killed. That, before he got there, he heard a hallooing, which alarmed him; that he ran, and when he got in sight of the house, the noise appeared to be between him and the house, a little to the right hand, under the hill. When he got in sight, he saw John Shropshire riding towards the noise, and before he got there Shropshire had gone back. When he arrived, Nancy Williams was ringing her hands and making a mighty to do. She was the wife of de-

ceased, and was standing within fifteen or twenty steps of deceased. He was shot, but witness knew not by whom. The remainder of his evidence was substantially the same as that of the above witnesses.

*Jesse Tober,* witness for the State, testified that he and prisoner were at the house of Lewis Russell, and prisoner told him that he was afraid that his (prisoner's) children had been his ruin —that he was afraid that he had killed Lewis Williams. That he had gone to the house of Williams (the deceased,) and said to him, "What sort of way is this that you and your wife get along?" That the deceased got mad, and that he (prisoner) struck at deceased with a chair; and the deceased went out of the house, and prisoner pursued a short distance. That deceased had a couple of rocks in his hands, and said that he would kill prisoner; that at that time prisoner had his gun on his arm, and fired it off for the purpose of scaring deceased, and did not aim to hurt him, and was afraid that the bullet had glanced the stable, and killed deceased. This conversation was had on the evening of the day on which deceased was killed. The prisoner remained but a short time with witness. Witness had not seen him since, until the present term of this court. That this was the first information witness had of the difficulty between deceased and prisoner.

*On cross-examination,* witness also stated that he was not certain whether it was the prisoner, or the wife of the deceased, that told him about drawing the chair; but he recollected that prisoner said that he followed deceased out of the house.

*Edward Roach,* witness for the State, testified, that one week after deceased was killed, prisoner made the following statement to him in Madison co: That, on the morning before the deceased was killed, there being snow on the ground, the wife of the deceased (who was the daughter of the prisoner) came to the house of the prisoner crying, and complained to prisoner that the deceased had put her out of the house, and drove her off. That, next morning, prisoner concluded to call on his neighbor Riggs, to go with him to deceased's to talk to him; that, whilst prisoner was at Riggs', the wife of the deceased, and her sister, passed by, on their

way to deceased's. That prisoner then concluded not to go to the house of deceased, but would hunt around in hearing of deceased's house, so that if there should be any fuss after deceased's wife reached home, he would hear it. That, in going on his way to deceased's, he found the wife of deceased sitting down crying. Prisoner asked her what was the matter? That she replied that she was afraid to go to the house. That he laid his gun down, and said he would go with her; that, on reaching the house, he asked deceased what the fuss was for? That deceased thereupon flew into a passion, and commenced cursing; that prisoner drew a chair, and deceased left the house, and went off; that the wife of the deceased asked prisoner where deceased had gone, and prisoner said towards Dawson's; that deceased's wife then said that deceased had gone after Dawson's gun, and prisoner had better get his gun; that prisoner then went and got his gun; that deceased soon returned with two rocks in his hands, and, as he came, prisoner discharged his gun for the purpose of scaring deceased; that when the gun fired deceased broke to run; prisoner then started home, and, before he had got out of hearing, he heard the screams of deceased's wife and her sister; that after prisoner got home, he sent his son, John, to deceased's, to ascertain what was the matter; John went, and, when he returned, reported that deceased was dead; and prisoner then left and went as far King's River, that night, which was Sunday.

Here the State closed her evidence.

*Nancy Williams,* witness for the defendant, and wife of deceased, testified, that deceased was killed in the month of February, 1846, that on Saturday, the day previous to the killing, it had snowed, and was still snowing—that deceased got up from the breakfast table and commenced whipping her child, and beat it very badly; then threw it up and swore that he would kill it or make it eat. Witness told deceased not to kill it; he then beat witness with a stick; he had cut her hand with a knife the Tuesday before. [Witness exhibited to the jury the scar of the stick and knife.] Deceased then threw witness out of the house and stood in the door of the house with a stick in his hand, and said

she should never come into the house again, that if she did, it would be at her own risk. Witness said she would have to go somewhere, that she could not stay there and freeze. Deceased answered, and said to witness—*'go to hell!'* Witness then went to the house of one Riggs and warmed, thence to the prisoner's, and told her mother how she had been treated, and asked her to get one of the boys to go and see if deceased would let witness have her child, which yet sucked. The boys refused to go lest they should have a difficulty with Williams, the deceased. Witness stayed all night at prisoner's. Next morning she got her sister to go home with her; on their way near to deceased, witness stopped and sent her sister to the house to ascertain if deceased would allow her to go to the house. Whilst witness was waiting by the wayside; prisoner came and enquired of her what was the matter, (witness was crying,) she replied, she was afraid to go to the house; prisoner offered to accompany her to the house. Before they got to the house prisoner laid his gun down, and did not take it to the house with him. When prisoner and witness got to the house, prisoner said to deceased, *"good morning,"* and said "this was a bad way of getting along; driving Nancy out of the house from her child, in the cold to freeze to death." Deceased said he had a right to whip his own child when he pleased. Prisoner said, yes he had such right. Deceased then said he would whip his wife when he pleased, and jumped up and went out of the house, and said to prisoner that he was ready for him, *"G—d damn him."* Prisoner then got up and went out. Deceased went off cursing and swearing, saying that he would go and get Dawson's gun, and kill prisoner. Prisoner then come into the house, and said to witness that deceased had gone for a gun to kill him; prisoner then started home, and, in a few minutes afterwards, deceased returned, with two rocks in his hands, swearing he would kill prisoner, and called for him; prisoner was yet in hearing; and answered, "Here I am." At this time, deceased was approaching the house, but turned and advanced upon prisoner with the rocks, swearing that he would kill him. Prisoner twice ordered deceased to lay down his rocks, but prisoner replied

that he would not do it. Witness then heard the report of a gun, when she started to see what was the matter, and met prisoner, and asked him if he had shot, and prisoner answered yes, but not for the purpose of killing deceased. Witness asked him where deceased was, and prisoner answered that he had gone over to the clift, where rocks were plenty; that he (prisoner) did not shoot to kill deceased; that deceased kept rushing on him; that he shot to scare him, and make him lay his rocks down, but had not hurt him. Prisoner then went on home, and witness found deceased at the clift dead.

When witness and prisoner first went to the house, deceased had his sleeves rolled up, and had his axe setting in near by the side of the door.

At the time prisoner shot, he and deceased were fifteen steps apart. Deceased had the rocks, swearing that he would kill prisoner before sun-down; was going towards him. Witness heard her mother tell prisoner, before the difficulty, that deceased had threatened to kill him. The clift, where witness found deceased dead, was about one hundred and fifty yards from the house of deceased. Witness saw deceased running after the gun fired. The shooting was done within about eighty yards, witness thought, of the house, near the stable. She saw prisoner's son, John, ride up near to where deceased was lying dead, and ride off again slowly toward home. This was some considerable time after deceased was killed, and before any of the neighbors came, after receiving information of the killing.

*Cross-examined:* The stick deceased struck witness with on the arm, and made the scar, was round, and a little larger than her thumb. After deceased went out into the yard, prisoner drew a chair. Witness did not see both the parties when the gun fired, but judged they were about fifteen steps apart from the noise. She did not recollect whether she told Robert Dawson, at the body of deceased, where it lay on the day of the killing, that prisoner drew a chair on deceased, and run him from the house. Witness was in the house, suckling her child, when the gun fired. Did not know how far it was from the house to where prisoner left

the gun, but it was opposite the end of the house from where the chimney was, and the door was on the opposite side of the house. Saw deceased just before the gun fired from where she was, but did not see prisoner, but heard him and deceased talking

The above was all the evidence in the case, as set forth in the bill of exceptions.

The court, at the instance of the Attorney for the State, instructed the jury generally, and, at the instance of defendant's counsel, gave the following instructions:

1. If the jury believe, from the evidence, that deceased had gotten the rocks spoken of by the witness, and was advancing on defendant with them, and that he had a well-grounded belief that deceased designed committing a felony on the person of him the defendant, with said rocks, they must find him, defendant, not guilty.

2. The State having gone into the confessions of defendant in relation to the difficulty charged in the indictment, the jury must take as evidence the whole of his confession, as said to have been made to witness Roach, and must pass on it as other testimony, and they cannot reject a part of such confession, and not all.

3. If they believe, on the whole evidence, that defendant killed deceased, but that he killed him either in defence of himself, or of his daughter, they must find him not guilty.

4. If they believe, from the evidence, that deceased, at and before the time of the alleged shooting, was rushing fiercely on defendant, with rocks, swearing he would kill him, it was not necessary for defendant to give back from deceased until he could not give further because of some wall, hedge, or ditch, but that he had the right to kill deceased before giving back so far.

5. It is the duty of the jury, if possible, to reconcile the testimony—the whole of it on both sides—and they are not at liberty to reject any part of it because of immaterial variances.

6. If they have a single doubt as to the killing being done feloniously, and in pursuance of a sedate, deliberate mind to mur-

der deceased, they must find defendant not guilty of murder, as charged.

7. That doubts from the evidence must always operate as an acquittal for the prisoner.

E. H. ENGLISH, for the appellant. The appellant claims a reversal of the judgment of the court below on several grounds, following:

1. The record states that the sheriff returned into court to serve as grand jurors, at the term of the court at which the indictment purports to have been found, "*sixteen* good and lawful men," &c. That *four* of them (naming them) failing to appear, *five* others (naming them) were summoned in their stead, making, in all, *seventeen.*

It is true that the clerk enumerated but *fourteen* names as constituting the original list returned by the sheriff, but the legal conclusion upon the record must be that there were *sixteen* upon the list, because, *first,* the record states that there were "sixteen good and lawful men," &c.; and, *second,* the statute (*Digest* 628) makes it the duty of the county court to select, and the sheriff to summon *sixteen,* and the presumption of law is that those officers discharged their duty according to law.

There being then *sixteen* returned by the sheriff, and *four* of them absent, and *five* summoned in their stead, it follows that the grand jury was composed of *seventeen* men.

If this conclusion is correct, does the fact that the grand jury, by which the indictment purports to have been found, was composed of *seventeen* men, vitiate the indictment?

A grand jury shall be composed of *sixteen* persons, qualified, &c. *Digest, p.* 397, *sec.* 64. Also *p.* 628-9.

The consent of twelve grand jurors is necessary to find a true bill. *Digest, p.* 400, *sec.* 83.

Suppose that, instead of *sixteen,* one hundred men are empannelled on a grand jury; it is clear that it would be easier to get *twelve* out of *an hundred,* than to get twelve out of *sixteen* to find a bill against a man. And so every man above *sixteen* that is

taken upon the inquest, increases the chances against the accused.

To illustrate: if twelve votes are necessary to elect a man to an office, he could get them more easily out of *an hundred* than out of *sixteen;* and so every additional man above sixteen would increase his chances of election.

It is true that one man makes but little difference; but if it be legal to go one beyond the legal number, where is the stopping point? The principle is as much violated by one as by one hundred additional men.

2. It does not appear that the indictment was found. or returned into court, by the grand jury.

The court commenced on the 4th day of May, 1846; and, on the 5th and 6th, the record shows that the "grand jury came into court, and filed divers indictments," &c., without showing against whom or for what offences. Then follows the adjourning order for the term. In the proceedings of a term of the court held five years thereafter, the indictment is copied, with no showing of record how it came into court.

The record no where shows that the indictment in this case was found and returned into court by the grand jury; which is necessary to guard the defendant against all imposition and fraud, as directly held in *Chappel vs. The State,* 8 *Yerger* 166.

In *Goodwyn vs. The State,* (4 *Smedes & Marsh.* 538,) the entry of record was as follows: "The grand jurors returned into court an indictment against William S. Goodwyn, indorsed a true bill, William M. C. Mims, foreman of the grand jury, and retired to consider of further presentments. Said indictment is in the words and figures as follows, to wit:" &c. [Then followed the indictment.]

The court, recognizing the principle that it is necessary for the record to show that the indictment was found and returned into court by a grand jury, held that the above entry showed that an indictment was found and returned into court by the grand jury against Goodwyn, and that other entries of record showed the charge to be *murder.*

In this case, several entries show that Shropshire was charged and tried for murder, but no entry shows that an indictment was found and returned by a grand jury against him.

It is true that the indictment copied in the record, is endorsed a true bill, and purports to have been signed by a foreman, and it is endorsed filed by the clerk. But neither of the endorsements shows that it was found and returned into court by the grand jury.

3. The defendant was tried by an incompetent judge. *A. B. Greenwood,* the record shows, was the attorney for the State when the indictment was preferred—it is signed by him as such. He no doubt prosecuted in the case for some five years, and then tried the case as judge, without any waiver of incompetency of record, or otherwise, as far as we are advised from the proceedings of record.

It is urged, by the Attorney General, that he was not *of counsel* in the case within the meaning of the constitutional provision on the subject; that there is no showing of record that the prosecuting attorney and the judge are the same person; and that there is an implied waiver of the objection, &c.

The constitution declares that "No judge *shall preside* on the trial of any cause, &c., in which he may have been *of counsel,* &c., except by consent of all parties." *Art.* 6, *sec.* 12.

The term *counsel* or *counsellor* is not used in our constitution, laws, or practice, in contradistinction to that of *attorney.* No such classification of the profession into attorneys, counsellors, &c., exists in this country as in England. They are called indiscriminate *attorneys* or *counsellors,* &c.

A. B. Greenwood was "*of counsel*" in this case. He was the attorney of the State, employed to prosecute, and, as such, drew the indictment, and conducted the cause until he ceased to be prosecuting attorney and went on the bench. His feelings were, no doubt, to some extent, enlisted in the prosecution, he obtained an *ex parte* view of the case by the examination before the grand jury, and every reason or argument that would have rendered the attorney of Shropshire incompetent to act as judge in the case, applied to him. The constitution makes no exception in favor

of one who has been of counsel for the State in a cause, but the disqualification is, as it ought to be, general. The object is to obtain a judge who is impartial, and has not in any manner prejudged the case, as the whole section of the constitution in question most clearly indicates.

But it is urged that the prosecuting attorney, *A. B. Greenwood,* and the judge, *A. B. Greenwood,* are not the same person.

Where no particular circumstance tends to raise a question as to the party being the same, identity in name is sufficient for an inference against him. *McNamee vs. United States,* 6 *Eng. Rep.* 150.

But this court *judicially knows* that *A. B. Greenwood* was *prosecuting* attorney of the judicial circuit from which this case comes at the time the indictment was preferred, and he was *judge* of the same circuit when the case was tried. See 1 *Greenl. Ev.* 8.

Courts take judicial notice of the essential political agents or public *officers* of the State.

But the attorney general urges that the silence of the record raises the presumption that the incompetency of the judge was waived. Will this court presume, in a case of this magnitude, that the defendant waived any important right? The presumption would rather be that he preferred to raise the objection on error, instead of making it at the trial. The defendant has a right to select his own time for raising legal objections to proceedings against him, unless the objection be purely matter in abatement, which he might waive by pleading to the merits.

This is a question of power. Judge Greenwood was constitutionally incompetent to try this case. He had no more right or power to try it than Col. Reagan, Shropshire's counsel, had. So far as this case was concerned, he was no judge. How could he get the power to try it? By the *consent of the parties,* says the constitution. This consent was as necessary to enable him to try this case, as his election, and commission were to empower him to try cases generally.

The record shows *affirmatively* that he was disqualified. Should

it not affirmatively show that the disqualification was removed by the *consent* of the parties?

The usual practice is for the consent of parties to be made of record, or at least for the record to state that they did consent. This being the usual practice, no such entry appearing of record, the presumption is that no such consent was given.

The incompetency of the judge could only be cured by the *consent* of the defendant for him to try the case. The term *consent,* implies *affirmative* action on the part of the defendant. How then could he empower the judge to try the case by being *silent* on the subject. The constitution does not say that the incompetent judge shall be qualified to try the case by the *silence* of the defendant, or by his failure to raise the objection when arraigned, but by the *consent* of parties. The record showing the disqualification of the judge, the defendant was not bound to say any thing on the subject, if the judge and prosecuting attorney chose to proceed with the case, until such time as he might think proper. He thinks proper now to raise the objection. If the indictment had been bad in substance, he might have gone to trial, and raised the objection on arrest, or on error, as he might think proper: and so as to the competency of the judge, the incompetency appearing of record.

The attorney general urges that the objection should have been raised *by plea to the jurisdiction,* and that it was waived by going to trial on the merits. In criminal cases, want of jurisdiction of the subject matter, or particular offence, may be shown on the trial, or on error, and is never waived. The qualification of the judge is not matter for a plea. The want of qualification is suggested, &c.

But the attorney general forgets that the consent of defendant —affirmative action—was necessary to empower or qualify the judge to try the case. How, then, I repeat, could this be done by *silence* on his part?

No motive is attributed to Judge Greenwood. The presumption is that he and the prosecuting attorney overlooked the fact that he had been prosecuting attorney in the case.

4. The court below erred in refusing a new trial. I think that no just minded person can read the evidence in this case, and not be shocked at the verdict. Whether this was a case of justifiable killing, or murder in the second degree, I shall not discuss; but that it was not murder in the *first degree*—that the old man ought not to be hung for the offence—I think there can be no doubt.

The evidence makes the following case, substantially:

The State proved the death of Williams by several witnesses, but failed to connect Shropshire with it except by introducing his own statements about it. His declarations, as introduced by the State, and the testimony of Nancy Williams, wife of deceased, who was the only eye-witness to the killing, and who was introduced in his behalf, connect Shropshire with the killing as follows:

The deceased, who seems to have been a rash, if not a brutal man, abused his *child,* abused his *wife,* and drove her out of doors. She, naturally, went to the house of her father, Shropshire, for shelter and protection. On the next morning, the old man persuaded her to return to her husband, and try to live with him, intending to hunt near the house of his son-in-law, so that he might be in hearing, and go to the relief of his daughter, should it become necessary. He followed on, and found her sitting by the wayside, crying, afraid to go to the house. The old man concluded to go with her, and fearing no doubt that the appearance of his gun might make a wrong impression on Williams, he left it behind, and went to the house with the daughter. He remonstrated with his son-in-law in reference to his ill treatment to his wife; but he, instead of listening to the admonitions of age, and the appeals of the parent in behalf of the daughter and the wife, flew into a rage, and manifested a disposition to violence. The old man probably raised a chair; this, however, is not certain from the evidence. Williams started off with the avowed purpose of getting a gun from one of the neighbors, but returned soon after with rocks, still manifesting intention to violence. The old man, in the meantime, having gone out to where his gun was, and seeing Williams with the rocks, coming toward him, fired

with the purpose to alarm and stop him, but the shot took effect. His intention was not to kill, as the State proved by his declarations.

On reading the evidence, the natural feeling is that Williams met the fate which one so brutal to his wife and child, and rash toward the father-in-law—whose purpose was to reconcile him to his wife, deserved. But it seems to me that no intelligent jury could make it more than manslaughter any way. That it was not murder in the first degree, is manifest.

"All *murder* which shall be perpetrated by means of poison or by lying in wait, or by any other kind of *wilful, deliberate, malicious* and *premeditated* killing, &c., shall be deemed murder in the *first* degree," &c. *Digest,* 323.

Under this statute, the offence must not only be *murder,* but it must be wilful, deliberate, malicious and premeditated murder; the policy of the Legislature, in accordance with the spirit of the age, being to continue capital punishment only in the most aggravated cases of murder, substituting imprisonment in the State prison for murder of a lower degree.

Mr. Justice SCOTT, in the case of *Bivens vs. The State,* (6 *Eng.* 460;) after reviewing decisions of several States on similar statutes, clearly defines murder in the first degree. According to the doctrine there held, it was necessary for the State to prove in this case, to make it murder in the first degree, "that the actual death of the party slain was the ultimate result sought by the concurring will, deliberation, malice and premeditation of the party accused. That there was a wilful, deliberate, malicious and premeditated *specific* intention on his part, to take life—that the killing was determined on before the act of killing. Though the design to kill need not be formed any great length of time beforehand, yet, it is necessary that the premeditated intention to kill should have actually existed as a *course* determinately fixed on before the act of killing was done, and was not brought about by *provocation* received at the time of the act, or so recently before as not to afford time for reflection."

Here the State proved by the declarations of Shropshire that

he had no intention to kill at all. But even if the State could resort to his declarations to prove the killing, and then repudiate so much of them as were exculpatory, and leave the intention to kill to be inferred from the instrument used, still all the circumstances show that it was not premeditated and deliberate, but that it occurred suddenly under great *provocation,* if not under circumstances of justification.

In the absence of proof of extenuating circumstances, the law implies malice from the act of killing, sufficient to constitute the offence of murder in the *second degree.* But this is *not the rule* with respect to *murder of the first* degree. To establish this degree of guilt the commonwealth must show those circumstances which evince a *deliberate intention to take life. Haggerty's Case,* reported in *United States Criminal Law, (by Lewis,)* 403.

In the case of *Mitchell vs. Slate,* 5 *Yerger. R.* 340, the distinction between murder in the first and second degrees, under the Tennessee Statute, from which ours is copied, is clearly defined. See the opinion of *Catron.* It was there held, that to constitute murder in the first degree, the killing must be done with a formed design to kill, with deliberation and premeditation, before the mortal blow is given. The fact that it was *malicious* and *wilful,* in the *common law sense* is *not sufficient.*

If a design to kill be formed upon the sudden impulse of passion disconnected with any previous design to kill. though it be executed wilfully and maliciously, it will not constitute murder in the first degree, but murder in the second degree only. *Ib.*

At common law, such malice might be implied from the act of killing, or from the character of the instrument used, as would constitute murder, but it is clear from the above authorities, that the law will not imply such malice from the killing or instrument as will constitute murder in the *first* degree under our Statute.

JORDAN, for the State. The objection raised to the competency of the court, if available at all, should have been by plea to the jurisdiction. But it does not appear of record that the prose-

cuting attorney who signed the indictment, and the judge who tried the cause, are the same person; and if it did so appear, this is not a case wherein he was "of counsel" as contemplated in *sec.* 12, *Art.* 6, *Const.*

That the evidence fully warranted a verdict of murder in the first degree; see the principles laid down in *Wharton's Crim. Law* 277, 285, 286, 288, 289, 290. *Respublia v. Mulatto Bob,* 4 *Dallas* 135. 2 *Stark. Ev.* 711, and authorities cited. *Whitesford's case,* 6 *Rand.* (Va.) *Rep.* 721. *U. S. Crim. Law, by Lewis,* 392, 393, 396, 397. 2 *Wheeler, Cr. Ca.* 84.

Mr. Justice WALKER delivered the opinion of the Court.

The defendant was indicted, tried and found guilty of murder in the first degree, upon which judgment was rendered against him.

Various grounds of objection are urged against the validity of the proceedings in the Circuit Court, several of which, though technical, in a case of this kind should receive the most careful consideration. For we are free to recognize and preserve unimpaired, all the safeguards which the law has thrown around the citizen, when arraigned upon a charge involving life itself, and to give him the full benefit of them.

The first ground of objection is, that seventeen, instead of sixteen, grand jurors were empannelled and passed upon the indictment under which he was arraigned and tried. This objection, if true, in fact, should have been reached by plea in abatement. It is, however, founded on a misapprehension of facts. The names of all the grand jurors are set out upon the record, but eleven of the first panel, answered to their names, and five others were returned, who being sworn and charged, composed the legal number.

The next objection is, that the record does not show that this particular indictment was returned into court, and ordered to be filed. The statute expressly forbids such an entry, unless in cases where the defendant is in custody or out on bail. (*Sec.* 86, *ch.* 52, *Dig.*) The object of the statute is, to keep the defendant

ignorant of the fact until he is arrested; otherwise, it would be rarely the case that a defendant could be caught. The authorities referred to may be good under other statutes, but cannot prevail under ours.

The next ground is, that the judge who presided at the trial of the cause, was the attorney for the State, at the time the indictment was found. Of this there is no proof. No objection was taken at the trial by plea, motion or otherwise; nor is there any proof that these are the same persons. The defendant's counsel contends that we should judiciously know, who the officers of the courts are. Concede this to be true, we know that at the time that the indictment was found, A. B. Greenwood was attorney for that circuit. This knowledge only extends to him as an officer. Whether he is an intimate acquaintance, or an entire stranger, in no respect changes the case. When he goes out of office, we cease to take judicial notice of him, or to know anything of the changes of pursuit which may engage his time, and when as an incumbent of a different office, we recognize him as such; it is with no reference or connexion with his former position, nor do the names add to or detract from such knowledge. This rule has its foundation in the necessity for its existence.—Judicial notice of officers, and of their signatures, seals of office, &c., are all necessary starting points to be taken upon faith and credit due to them, as connected with the administration of justice. As incumbents in public trust, they are known for the time being but in no other respect whatever.

The true mode of reaching objections of this kind is not altogether clear. This court, in the case of *Caldwell ad. v. Bell & Graham,* (1 *Eng.* 228,) held, that suggestion or motion was necessary in order to raise the question; and even that practice is involved in difficulty. There is no precedent for the practice, for the practice in the English courts, and it is very questionable whether an attorney there, would not be fined for a contempt, should he propose to a judge to decide whether he was judge or not. But, however, this may be, the question is not raised here; there was no objection to the competency of the judge. We ju-

dicially know, that Judge Greenwood is the incumbent in office in that circuit; and in the absence of evidence of his disqualification, we must hold him fully competent to preside.

There is no question of law disconnected from the motion for a new trial in the case. That is solely as to whether the verdict is, or is not contrary to law and evidence.

It appears, that in the month of February, 1846, in the county of Carroll, Arkansas, Lewis Williams, a resident of said county, was shot near his own house. No one appears to have been present at the time he was killed, except the wife of the deceased, and possibly her sister, who, however, was not called as a witness. So far as regards the time, place, the identity of the person killed, and his death at the hands of the defendant, there seems to be no question. The whole contest is narrowed to an enquiry as to the circumstances under which the killing took place, and the probable motives which induced the defendant to commit the act.

The circumstances which most probably led to the difficulty, which terminated in the death of Williams, were connected with, or grew out of his treatment to his wife, who was the daughter of the defendant, and for them we are almost entirely dependent on her own account of the affair. She was the only witness examined on the part of the defendant, and according to her account of the matter, was whipped, or beaten with a stick, and turned out of doors by her husband, without any other provocation than that she requested him to desist from whipping her child. She went to her father's, staid all night, and related to her mother the occurrence; whereupon, on the next day her sister and father accompanied her to the house of deceased. The sister had been sent on in advance by the wife, to see whether her husband would permit her to return, and, whilst she was waiting by the wayside to learn the result, her father came by and learning the facts, left his gun, and went with her to the house of deceased, greeted him kindly, and inquired the cause of his ill treatment to his wife. Deceased became angry, asserted his right to whip either his wife or child, and went out of the house, and said he was ready for defendant; that defendant drew a chair on

deceased after he had left the house. Deceased then went off, saying, that he would get Dawson's gun, and kill defendant. Defendant started home, and before he got out of hearing, deceased returned with rocks in his hands, threatening the life of defendant and called for him. Defendant heard him and replied, "here I am." Deceased was at that time approaching the house, but turned, and advanced upon defendant, threatening to kill him, and refused to put the rocks down when requested. Witness then heard the report of the gun, and started to see what was the matter, met the defendant, who told her he had shot but not to hurt the deceased, who was rushing upon him; that deceased ran towards the cliff where rocks were plenty. Witness also stated that the parties were about 15 steps apart when the gun fired. She saw deceased advancing to her the moment when the gun fired; she did not see defendant shoot; was sitting suckling her child at the time the gun fired; the parties were about 80 steps off from the house; she saw deceased run off after the gun fired.

This is substantially the evidence of the only eye-witness to the transaction, who deposed, and the credit due to it must in some degree, depend upon its consistency as a statement of facts, and with the other evidence in the case.

The State introduced two witnesses, who deposed as to different confessions made by the defendant to them. To the first, the defendant stated that he was afraid his children had been his ruin; he was afraid he had killed deceased; that he went to the house of deceased, and inquired of him about his difficulty with his wife, whereupon he became angry, and defendant had struck at him with a chair; that deceased went out of the house, and the defendant followed him a short distance; deceased had rocks in his hands, with which he threatened defendant, who having his gun on his arm at the time, fired it off to scare the deceased; that he did not aim to hurt him, but was afraid the bullet had glanced the stable and killed him. Witness had never before heard of a difficulty between deceased and his wife.

The second confession, after reciting the circumstances which led him to the house of deceased, is, that the deceased be-

came angry when he mentioned the object of his visit, and that the defendant drew a chair on him; that he left the house and went off; that deceased's wife asked where he had gone, he answered, towards Dawson's, whereupon, she said he had gone to get Dawson's gun, and defendant had better get his gun, which he did; that deceased returned with rocks in his hands, and as he came, defendant discharged his gun to scare him, and started home. As he went, heard the wife of deceased and her sister screaming.

The State then called some three or four witnesses, neighbors of deceased who went to the place that evening, and examined the body and the ground on which the shot took place. They all give the same account of the matter. There was snow on the ground, and they state that they could distinctly see all the tracks made by the parties. They found the deceased's body about 150 yards from where deceased was shot, followed the track to the place where they supposed the parties stood when the gun fired: they were about 19 steps apart and about 75 steps from the house; the tracks of both parties came from towards the house, though not directly following each other; from the tracks, it seemed that deceased had stopped behind the crib, and seemed to have walked on about 15 steps and stopped; there he was shot; it was two or three steps from there before they saw blood: the tracks of the person who, they suppose, shot deceased, did not go directly up to the crib, but came within 15 or 20 steps, and then turned back and seemed to follow the tracks of deceased until he was shot: deceased ran 150 yards off from the house towards the path to the nearest settlement; in following the track where deceased ran, there was a rock, about two pounds in weight, which appeared to have been dropped in the snow: deceased had no weapons about him; he was shot in the lower part of the shoulder, and the ball came out in front in the lower part of the neck; there was no other wound perceived.

These are the material facts in the case; and they should be examined in a two fold point of view; first, to reconcile, if possible, the conflicting evidence of the witnesses, and to determine

the credit due to the witnesses as their statements stand thus reconciled or contradicted by other evidence; and then to apply the evidence to the case under consideration.

The jury had also a right to consider the weight due the evidence of a witness from the relationship which such witness bore to the parties, his or her opportunities for thorough accurate information, from the manner of deposing, whether full and circumstantial on points favorable to one side and reluctantly as to such as are prejudicial or unfavorable to that side, as well as when the statements are improbable in themselves as existing under the known or admitted circumstances connected with them. And in this case, when the witness, the daughter of the defendant, related as the only provocation given her husband for the cruel conduct which she says followed the request on her part to desist from whipping the child, the treatment to her is so disproportionate to the offense, (if such it could be called,) that whilst it blackens the character of the deceased, if true, it invites for its unnatural enormity an increased scrutiny as to the probability of the act itself. So, the improbability that a blow, stricken with a round stick on the arm, would cut it so as to leave a scar to be seen more than four years after, without breaking the bone of the arm, or so injuring it as to render it useless for a time, and have made it the subject of complaint and observation at the time, is altogether improbable, nor is it less so, that with a knowledge of the facts and threats and acts of the parties at the time the shot was received, that being the wife of one and the daughter of the other, she could have sat suckling her child where she could see her husband advancing upon her father, but not her father, who she knew had a gun (taken at her own suggestion, too, according to his account of the affair.) Surely, if there ever was a time when the breast of woman would refuse to yield sustenance to her offspring, it might have been for the moment suspended then. These things could not have escaped the observation of an intelligent jury. Nor is it to be presumed that they failed to remark that, without interrogatory, (so far as the record shows,) she volunteered to state that she had heard her mother tell her father, some time

before the killing, that deceased had threatened defendant's life, thus linking a threat and its communication to the defendant in a single sentence without interrogatory and without the slightest reference to any cause or circumstance to justify it. Nor is there such throughout the whole of the evidence. On the contrary, the only witness who alludes to the previous state of feeling between the deceased and his wife, stated that he had never, before the circumstance related as giving rise to the difficulty in this case, heard of any difficulty between them. These circumstances were all calculated to cast suspicion upon the evidence of this witness, and, when the facts which she relates in several material points are flatly contradicted by other facts and circumstances, might, in the estimation of the jury, have been sufficiently strong to have induced them to reject her evidence as wholly unworthy of credit. Thus, she stated that her father drew a chair on the deceased after he had left the house. Aside from the improbability of this, the defendant's own confessions expressly contradict it. She says that when deceased went off, defendant came in the house and told her that deceased had gone for a gun to kill him (defendant) with; defendant says, in his confession, that she told him that deceased had gone to get a gun to kill him with, and he (defendant) had better get his gun. She says that, after communicating to witness where deceased had gone, defendant started home, and answered to call of deceased when he returned; such is not the account given by the defendant. But the most important point is, that when deceased came back with rocks, he inquired for defendant, and, upon his answer, on his way home, deceased turned and advanced upon defendant with rocks; aside from the great improbability that a man who had been made to leave his own house by simply raising a chair on him, would attack the same man with a gun, with no other means of defence than rocks, it is just as impossible for her statement with regard to the fact of his advancing on the defendant to be true, as if some four disinterested spectators, placed there for the purpose of seeing whether there was an advance or not, made by the deceased upon the defendant, had sworn that such was not the case: for,

as many such witnesses swear that they examined the tracks, that all the tracks were plain to be seen in the snow, that both the tracks of the deceased and of him who they suppose shot him came from towards the house, though not one immediately after the other, until within some 15 or 20 steps of the crib, the tracks of the defendant or him who shot (and as to the identity of person there is no dispute) turned and followed on the track of the deceased until he was shot. The tracks of the deceased were all receding, not advancing steps. The shot was received in the back and came out in front. It was impossible that he could have been facing defendant at the instant of the shot. The statement of this witness, aside from all contradictions, was certainly untrue in this material particular, and if so, under a well recognized rule of evidence, might have been by the jury, wholly disregarded.

And the defendant's statements are not only contradictory in themselves, but flatly contradicted by these witnesses. The deceased could not possibly have been rushing upon him, as he stated in his second confession (for, in his first, he does not so state it.) It is impossible for him to have done so without the tracks having been seen by those witnesses who followed the tracks and examined the signs so closely as to notice even the falling of a rock into the snow—men who, from their residence and pursuits, it may well be presumed, were eminently fitted to detect the slightest impression made, not alone in the snow, but even the flint covered mountain sides of their neghborhood. These facts are not to be mistaken, and from them the jury were well warranted in the conclusion that the shot was made either at the time when the deceased was not aware of it, or at least not advancing to assail the defendant. He was found dead, and wholly unarmed. It is highly probable, from the circumstances, that he had a rock in his hands when shot, or otherwise there is no accounting for that apparently dropped in the snow on the way in which he ran.

In view of the whole of the circumstances, it is probable that the difficulty did arise out of the treatment by the husband (the deceased) to his wife; but whether that was or not of the aggra-

vated character related by the wife, is much to be questioned. Whether true or false, however, if credited by the defendant, and he acted under it as true, it was the same as to him if probable in itself. If the defence had been rested upon sudden passion, the feelings of an indignant father at the treatment of his daughter, and the conduct of the father had been consistent with such feelings and influences, a jury might have hesitated long whether their verdict should not have been milder in consideration of such influences.

But the defendant, according to his own account of the affair, places his acts upon entirely different ground, and makes the act to follow the occurrences in the house, in which it is evident he was the principal aggressor, and even then he does not follow it up as an act under the influence of passion suddenly aroused, but of deliberation to alarm the deceased and make him throw down the rocks which he held in his hand. The effort to make it appear the result of accident or a glancing shot not aimed, is altogether irreconcilable with the facts, aside from its inconsistency in other respects with the evidence. The shot in the back shows that the relative position of the parties could not have been such as to require it, and as all the circumstances show that time was given for passion to cool and reason resume its empire, of which it was the province of the jury to decide as well as of all the other facts and circumstances of the case, and from which they were well warranted in finding the defendant guilty of murder in the first degree.

There is no question of law ruled against the defendant in the case, no improper conduct on the part of the jurors, or improper influences affecting their decision, or in any wise calculated to influence them improperly in making it. And after the most attentive consideration of the whole of the evidence before them, we are led to the conclusion that their verdict was well sustained by the evidence; and that the Circuit Court did not err in refusing to grant to the defendant a new trial in this case.

The judgment and decision of the Circuit Court of Carroll

county must, therefore, in all things, be affirmed, and the cause remanded, that the State may cause the judgment and sentence of the Circuit Court to be carried into execution under the provisions of the statute. *Dig., p.* 418, *ch.* 32, *sec.* 206, 207.