JONES *vs.* MASON.

Before judgment of forfeiture of a gun found in the hands of a slave, under *chapter* 153, *section* 52, *Digest*, the owner of the property should have actual or constructive notice of the proceedings.

But in trover for a gun, where the defendant claims title under such judgment of forfeiture, the question of want of notice to the owner could not properly arise. It could only be raised in a direct proceeding by *certiorari* from the Circuit Court to quash the judgment of the justice, &c.

Where in such action, defendant sets up title to the gun by such judgment of forfeiture, the plea should state all the facts necessary to show jurisdiction on the part of the justice, there being no intendment in favor of such jurisdiction. Hence, such plea failing to show that the judgment of forfeiture was rendered within the territorial jurisdiction of the justice, &c., is bad.

The plea should also state, in express terms, the names of the parties, that plaint was made before the justice, &c., the judgment of forfeiture, &c.

Writ of Error to Ouachita Circuit Court.

This was an action of trover for a rifle gun, bought by Thomas

Jones, against Peter Mason, and another, in the Ouachita Circuit Court.

Defendant, Mason, pleaded the general issue, and a special plea as follows:

Defendant says *actionem non,* "because he says that he did, at, &c., find the said rifle gun mentioned in the said plaintiff's declaration in the possession of a certain negro slave named *Spencer,* on or about the 1st December, 1849, and at that time in the employ of the said plaintiff, belonging to the estate of John Hardin, and at that time hired to the said plaintiff, without the said negro slave named as aforesaid having the written permission of his said owner, or him the said plaintiff, according to the statute in such case made and provided; whereupon, the said defendant did, in pursuance of the statute aforesaid, seize the said rifle gun in the possession of the said slave, (without the written permission aforesaid,) and having proved the fact of such seizure before one Ralph E. Dickson, a duly constituted and acting justice of the peace, in and for the county of Ouachita, &c., the said Ralph E. Dickson, as justice aforesaid, did thereupon, in pursuance of the statute in such case made and provided, adjudge the said rifle gun mentioned in the said plaintiff's declaration belonging and forfeited to the said seizor of the same, the said defendant, for his own use; all of which proceedings and decision of said justice, the said defendant hereby offers to prove by the record of the said justice as aforesaid—and this said defendant is ready to verify, wherefore," &c.

The plaintiff demurred to the plea on the following grounds: "1st. The plea purports to set up title in defendant to the gun, but does not show that his title was prior to the institution of this suit: 2d. Said plea sets up title in the defendant without denying the title of plaintiff: 3d. Said plea shows no title in the defendant which is valid, or warranted by the laws of the land: 4th. Said plea is no answer to the plaintiff's action: 5th. Said proceedings before the said justice of the peace are null and void."

The court overruled the demurrer, plaintiff rested, and suffered judgment to go for defendant.

STITH, for the defendant. The defendant's plea does not confess and avoid or deny the plaintiff's title. Pleas in confession and avoidance must admit that the plaintiff would have had good cause of action if it were not for the new matter which the defendant brings into the case. 1 *Ch. Pl.* 528.

As the plea sets up a title derived from the plaintiff by operation of law, it should have set out every fact necessary to show a good title in the defendant; and as the justice's court is a court of limited jurisdiction, every fact necessary to give it jurisdiction should appear. *More v. Woodruff,* 5 *Ark. Rep.* 214. And it appears that the proceedings were *ex parte,* and without notice to the plaintiff.

The section under which the proceedings before the justice were had, *section* 52, *chapter* 153, *Digest,* is a mere police regulation, and only intended to prohibit slaves from owning or carrying arms without the permission of the master, and the only forfeiture contemplated is, of all right which the slave may have in the gun.

Mr. Justice SCOTT delivered the opinion of the Court.

We have to determine in this case whether or not the demurrer to the defendant's special plea was properly overruled. The first objection to the plea was not well taken, because the defendant set up new matter in avoidance of the plaintiff's case as made in the declaration, and tendering an issue as this must be taken as confessing otherwise, as to this plea, the cause of action. The second objection involves a more important inquiry, and seems to be founded in principle upon the common law rule of the necessity of a proceeding *in personam* and a conviction of the offender before the crown could acquire any title to the goods forfeited, and to urge from this that until such conviction the informer under the statute, (who under its provision substantially succeeds to the title of the crown) could acquire none.

This doubtless was the true rule as to many cases of felony, and some other cases where the forfeiture was a part, or was the con-

sequence of the judgment of conviction and did not, strictly speaking, attach in any sort *in rem.* But when the forfeiture attached primarily *in rem* as in cases of seizures and forfeitures created by statute and cognizable in the revenue side of the Exchequer, the rule requiring the conviction of the offender did not apply. In these cases, the thing was considered as primarily the offender or rather the offence was attached primarily to the thing, and a principle applied similar to that which governs proceedings *in rem* on seizures in the admiralty courts, where, although the proceedings are in form *in rem,* and the owner of the goods proceeded against is not in the first instance *eo nomine* a party defendant, yet, before judgment of condemnation an opportunity is afforded him to come in and make himself a party and defend against the proceedings.

Although our statute (*Dig., ch.* 153, *p.* 951, *sec.* 52,) is a police regulation designed to augment the personal security of the citizen by creating the forfeiture provided for, and is within the undoubted powers of the legislature, its provisions are nevertheless to have effect like those of almost every other statute, in reference to the other laws of the land. It is true that under the provisions of this statute the law does not, in the first place, stop to enquire as to the ownership of a gun, or other offensive or defensive weapon found in the possession of a slave without the written permission of his master, but at once, by the hands of any citizen, seizes upon any such weapon and authorizes a proceeding against the thing for a judgment of forfeiture to the seizor for his own use: but from this it does not necessarily follow that the judgment of forfeiture or condemnation provided for shall be rendered before the original owner shall have first had some reasonable opportunity to come in and make himself a party to the proceedings *in rem,* and contest the judgment of forfeiture.

Such owner might not in fact be known or might reside beyond the limits of the State, as in cases where such weapons might have been taken from the hands of a runaway slave, who might have brought them from a neighboring State, and thus actual personal notice previous to judgment of forfeiture might not be

practicable; nevertheless constructive notice might at least be given and would seem to be demanded by analogous proceedings, especially when it may be remembered that forfeiture of the right of private property, whereby one citizen is to lose his property and another is to acquire it is not to be created arbitrarily by the legislature, but can only be rightfully done for the advancement of the public weal as a punishment annexed by law to some illegal or culpably negligent act of the owner. If by private theft or open robbery, without any fault or negligence on the part of the owner, a slave should invade his property in a gun, shall the law punish him by a forfeiture of this gun without first giving him an opportunity, actual or constructive, to defend against the proceeding *in rem* for judgment of forfeiture?

We think it could never have been the design of the legislature to have created a forfeiture when there was no fault or negligence on the part of the owner, and his right of property had been thus unlawfully invaded. Hence the necessity of notice, either express or implied, to afford the owner an opportunity to repel the presumption against him arising from the fact that his property has been found in the hands of a slave without the written permission of the master of such slave. If no such notice and opportunity be given to come in and defend, error must necessarily intervene in a judgment of forfeiture. Because although this particular statute does not provide for such proceedings, the general law of the land does, of which this statute is a part. But that error, although so much discussed by the counsel, is not properly presented to us on this record, and if it in fact exists, can be reached only by *certiorari* from the Circuit Court on a direct proceeding to quash the judgment of forfeiture that it may be determined anew by the justice.

The vital question before us being as to the sufficiency of the plea in showing the jurisdiction of the justice, the statute, under which it is alleged in general terms that the justice took cognizance of the alleged forfeiture, is a public act of which we take judicial notice; but still the plea is insufficient unless all the facts are stated in it that are necessary to show jurisdiction in

the justice, because nothing must be intended in favor of his jurisdiction that is not set forth in the record. When tested by this rule, the plea is wholly insufficient, because it is not stated therein that the alleged judgment of forfeiture was rendered within the territorial jurisdiction of the justice. No time or place whatever having been alleged when and where the proof of seizure was made and the supposed judgment was rendered. And it is clear that the justice had no authority to hear such proof, and render such judgment any where else than in his county.

The plea is also otherwise inartificially drawn in failing to set out the parties in express terms, and in failing to allege that plaint was made and thereupon afterwards, &c., such and such acts were done before and by the justice according to the facts.

The plea then, in failing to show jurisdiction, was radically defective, and the court below erred in overruling the demurrer that was interposed, and for this error the judgment must be reversed, and the cause remanded to be proceeded with.