BROWN *vs.* THE STATE.

An irregularity in the summoning or empanneling the grand jury, can be taken advantage of only by plea in abatement.

The conclusion of an indictment, *contra formam statuti,* is mere matter of form, and the statute (*Dig. p.* 402, *sec.* 98,) declaring that the want of such conclusion shall not be ground to quash the indictment, arrest or reverse the judgment, is not in conflict with the clause in the Bill of Rights securing to the accused a trial on *indictment,* &c.

It is no ground of reversal, that the order for a change of venue in a criminal case, does not pursue the statute: if there be ground of objection to such order, it is waived if the party does not take advantage of it in the court below.

Where the record is silent upon the subject, this court will presume that the court below, in passing sentence upon a person convicted of crime, complied with the provisions of *sec.* 2, *p.* 378, *Digest:* but if the court in fact omitted to do so, such omission would be no cause for reversal of the judgment—but a compliance with the statute might be directed.

Writ of Error to Madison Circuit Court.

ARCHIBALD BROWN was indicted in the Carroll Circuit Court, at September term, 1849, for stealing a mare, alleged to be the property of William W. Chaney.

The *caption,* after stating the time and place of holding the court, &c., proceeded thus: "And now on this day the sheriff returned into court the following list of Grand Jurors, by him summoned, in obedience to a writ of *venire,* to him directed, *to-wit:* J. F. &c., &c., and the *caption* proceeds to show that they were sworn, charged &c., in the usual form.

The body of the indictment is in the usual form for larceny, and it concludes: "against the peace and dignity of the State of Arkansas," but not *contra formam statuti.*

The defendant pleaded not guilty, and then filed a petition for change of venue, on the grounds "that the inhabitants of this

county (Carroll) are so biased and prejudiced against him that he cannot have a fair and impartial trial," &c.

On which the court made an order "that the prayer of the petitioner be granted, and that this prosecution be removed to the county of Madison, in the State of Arkansas." The defendant being in custody, it was further ordered, that the sheriff remove him to the Madison jail, &c.

At the October term, 1849, of the Madison circuit court, (Hon. W. W. FLOYD, Judge, presiding) it appears from the record that the State's attorney filed a transcript of the proceedings of the Carroll circuit court in the case. Counsel was appointed for the prisoner, he was tried by a jury, and a verdict of guilty returned against him, fixing his punishment at five years imprisonment in the penitentiary.

Defendant's counsel moved for a new trial, on the grounds that the court erred in charging the jury, and that the verdict was contrary to law and evidence. The court overruled the motion, and no bill of exceptions was taken.

The court then proceeded to pass sentence upon the defendant, but the record does not show that the law in relation to his punishment was read and, the consequences of the sentence declared to him, &c., as directed by *sec.* 2, *p.* 378, *Digest.*

Defendant brought error.

E. H. ENGLISH, for the plaintiff. 1. It appears from the *caption,* that the Grand Jury was "summoned in obedience to a writ of *venire.*" From what court did this *venire* issue? Not from the county court, because it could issue no writ returnable to the circuit court. 3 *Ark. Rep.* 352.

The county court is authorized to select grand jurors, and deliver to the sheriff a *list* thereof, and he is required to summon them. *Digest, chap.* 94, *sec.* 2. If no county court is held at the proper time to make the list, the sheriff may summon grand jurors without process. *Ib. sec.* 3.

There are probably two cases, and but two, where a circuit court could issue a *venire* for a grand jury. *First,* where none of those selected by the county court, or summoned by the sheriff,

attend. In such case, the court might order a *venire* for the entire panel. *Ib. sec.* 4. Or, *second,* where an offence is committed during the sitting of a court, after the grand jury are discharged, the court may order a *venire* for a special grand jury. *Digest,* 399. But in either case, the record should show the facts necessary to authorize the circuit court to issue such venire.

In this case, the record shows that the grand jury were summoned under and in *obedience* to a *venire.* The county court could issue no *venire,* returnable to the circuit court: the circuit court could issue none, except in cases especially provided by law; but it does not appear of record, that the legal necessity to authorize the circuit court to issue such venire existed in this case; hence, the grand jury were illegally summoned, and the bill found by them in this case, and all proceedings had thereon, are void and of no effect.

2. The indictment is bad because it does not conclude, *against the form of the statute, &c.*

The Bill of Rights declares that no man shall be put to answer any criminal charge, but by presentment, *indictment* or impeachment. *Sec.* 14.

The term *indictment,* is used in the Bill of Rights, in its legal technical sense, and imports whatever was essential to constitute a good indictment at common law. See *Cox v. The State,* 3 *Eng. R.* 442. The term *jury,* as used in the Bill of Rights, means *twelve* men, and the General Assembly cannot abridge the number. *Ib.* So, by the strongest analogy, no common law requisite of an indictment can be dispensed with by legislative power.

An indictment for an offense at common law, concludes "*against the peace of our Lady, the Queen, (or Lord, the King,)*" and these words are essential. *Arch. Crim. Law,* 55. 1 *Chit. Crim. Law,* 246.

For peace of the *King* or *Queen,* our constitution has substituted the *State of Arkansas,* (*Art.* 6, *sec.* 14,) which is our *Sovereign,* but no other change is made, nor was it designed by this provision to dispense with any other common law requisite in the

conclusion of an indictment, for common law is not repealed by implication.

Where a statute either creates the offence altogether, or makes an offence at common law an offence of a higher nature, (as for instance, where it makes a misdemeanor a felony,) an indictment for the offence *must* conclude *contra formam statuti.* If the statute do not make it an offence of a higher nature, but merely increase or otherwise alter the punishment, &c., (as, for instance, perjury under *Stat. Ed. c.* 9,) the indictment, in *order to bring the offence within the statute,* must conclude *contra formam statuti,* but if it does not conclude, it may still be a good indictment *for the offence at common law. Arch. Crim. Plead.* 56, and cases there cited.

This indictment is for horse stealing, under *sec.* 7 *Digest,* 337. If we regard the offence as being created by statute, then the indictment should have concluded against the form of the statute: so if it increases the offence. But if it merely change the punishment, then, inasmuch as the other indictment does not conclude against the form of the statute, it does not bring the case within the statute, and defendant should have been punished as at common law, if he could be punished under the indictment at all, and this is clear from the above authority.

In Mr. ARCHIBOLD'S precedent for horse stealing, and on English statute, he concludes *contra formam statuti. Arch. Crim. Pl.* 195.

The Legislature (*Digest, ch.* 52, *sec.* 98,) have undertaken to say that no indictment shall be invalid for the omission to charge it to have been committed contrary to a statute, notwithstanding such offence may have been created, or the punishment thereof have been declared by the statute. This statute shows that such words were necessary at common law, and it can answer no other purpose. For if the Legislature can dispense with the common law requisite in the conclusion of an indictment, it may dispense with any other part—with *venue—time*—the *Christian* name of defendant—all *technical terms* designating the grade of the offence—and thus point by point may fritter away the right

of the defendant to be tried by an indictment. Once pass the *old land marks,* and where is the stopping point?

3. The order for change of venue does not state what the law requires. *Digest, p.* 408. This may be directory, and may not vitiate, but if it does, plaintiff in error claims the benefit of it.

4. It does not appear of record that he was sentenced according to law. See *Digest, p.* 378, *sec.* 2. Possibly this court will presume the circuit court discharged its duty in that respect, but the law does not favor presumptions against liberty.

CLENDENIN, Attorney General, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The first objection is not well taken, because any question, as to whether a grand jury has been drawn, summoned or empanneled according to law, can only be considered under a plea in abatement. (*State v. Greenwood,* 5 *Porter R.,* 474.)

The second objection relates to a mere matter of form in the indictment, (*State v. Posey,* 5 *Strob. R., at p.* 124,) and is regulated by a provision of our statute, (*Dig., ch.* 52, *sec.* 98, *p.* 402,) which is clearly constitutional.

The third objection is unsubstantial at best, but at any rate it cannot be taken in this court after having been passed by and waived in the court below. (*The State v. Hicklin,* 5 *Ark. R.* 191.)

This court will presume that the circuit court did its duty under the provisions of the statute, requiring the law relating to the pains and penalty inflicted upon the convict to be read to him and the consequences to be declared, that he may not be ignorant of the sentence pronounced upon him; (*Dig., p.* 378, *ch.* 51, *sec.* 2.:) and if, in fact, that should be entirely omitted, it would be no cause for a reversal of the judgment. At the most it could but be a ground to order the convict back to the circuit court to be there enlightened, and then remanded to the Penitentiary in pursuance of his sentence.

We find no error in the face of this record, and, as neither the

facts proven on the trial, nor the evidence adduced, has been presented by bill of exception, the presumption is, that the court properly overruled the motion for a new trial. Let the judgment be affirmed.