McBRIDE *vs.* THE STATE.

On an indictment for an assault with intent to commit mayhem, the defendant may be acquitted of the intent charged, but convicted of an assault.

An attempt to commit a felony against the person of another involves an assault.

Writ of Error to the Circuit Court of Yell County.

THIS was an indictment against McBride for biting off the ear of Joel Hubble with intent to maim him. The case was tried by the court, sitting as a jury by consent; the Hon. R. C. S. BROWN, judge.

The court found "the said defendant not guilty of the mayhem set forth and charged upon him by said indictment, but finds the said defendant guilty of an aggravated assault, and assesses his fine at fifty dollars." Judgment was then regularly entered. McBride brought error.

W. WALKER, for the plaintiff. The judgment of the court below is clearly erroneous. That a defendant cannot be found guilty of a misdemeanor on an indictment for felony has never been questioned. See 1 *Chitty's Crim. Law, m. p.* 639.

Mayhem is a felony. (See 2*d sec.* of the 3*d Art.* of the 44*th ch. Rev. Stat.*) And the penalty is imprisonment in the penitentiary. See the act modifying the penal code, section 9.

WATKINS, Attorney General, contra. We are bound to presume that the proof on the trial was that the parties fought by mutual

agreement, and in such case if one of them be maimed the offence is not maiming, but the punishment is for an aggravated affray and the conviction is proper under the *8th sec. of art.* 3 *of Div.* 3 *of the Criminal Code, Rev. Stat, page* 244. The mere circumstance that the term aggravated assault and not aggravated affray is used in the judgment, can make no difference as to its validity. Every affray includes an assault. The meaning of the statute is, not that the parties maiming are guilty of an affray, but that the punishment shall be as for an aggravated affray; and not because the fighting must have taken place in a public street or highway, but because the fighting was by mutual consent.

It is a well settled common law rule that in indictment for offences of the same class, the major offence includes the minor, and according as the case turns out in evidence, the defendant may well be acquitted of the greater and convicted of the lesser crime. *Roscoe Crim. Ev.* 73, 74, and cases cited. *Archbold Crim. Plead.* 357. *Chitty's Crim. Law.*

In the absence of any tangible objection apparent on the record, the judgment of the circuit court must be affirmed.

JOHNSON, C. J. This is an indictment for an assault with intent to commit the crime of mayhem. The defendant was acquitted of the intent charged against him but convicted of an assault. The only question raised by the record is whether the circuit court erred in thus acquitting the defendant of the intent to maim, and convicting him of a common assault. Every attempt to commit a felony against the person of individuals involves an assault. Prove an attempt to commit such felony, and prove it to have been done under such circumstances that had the attempt succeeded the defendant might have been convicted of the felony, and the party may be convicted of an assault with intent to commit such felony. If you fail in proving the intent but prove the assault, the defendant may be convicted of the common assault. See *Archbold's C. P. p.* 357. A party indicted of one offence may be convicted of a lesser, provided it be of the same class with that with which he is charged. "On an indictment for an assault with intent to murder,

there may be a conviction of an assault simply. *State vs. Coy,* 2 *Atk.* 181. *Stewart vs. State,* 5 *Ohio* 242. If a party indicted for an assault with intent to murder could be convicted of a simple assault we think it clear that such a finding would be good under an indictment for an assault with intent to commit mayhem. The offence charged against the defendant below necessarily includes a simple assault, and the two offences clearly belong to the same class. Affirmed.