HUDDLESTON *vs.* SPEAR.

In trepass against a sheriff, he cannot justify under process issued upon a judgment void for want of jurisdiction of the subject matter.

The County Court has no jurisdiction to render judgment upon an estray bond, where the sum in controversy is less than one hundred dollars: in such case the jurisdiction of a justice of the peace is exclusive. *Dilliard v. Noel*, 2 *Ark. Rep.* 454, cited.

In an action of trespass *de bonis asportatis* it is not competent for the defendant to show property in a stranger to excuse the trespass and justify the taking.

If a person has peaceable possession of a chattel, this gives him a right as against every body but the rightful owner.

Writ of Error to Hempstead Circuit Court.

Action of trespass *vi et armis* brought by John Spear against Lewis Huddleston, in the Hempstead Circuit Court, and determined in Nov. 1846, before the Hon. GEORGE CONWAY, Judge.

There are two counts in the declaration: first, that on the 15th March, 1845, at the county of Pike, to wit, in Hempstead county, the

defendant took and led away a mule of plaintiff's, and converted and sold it to one Dickson : 2d. That defendant took the mule and converted it to his own use.

Defendant pleaded first not guilty, and second a special plea of justification as follows, in substance:

That the State of Arkansas, for the use of the county of Pike, on the 12th May, 1845, recovered judgment in the County Court of Pike county, against Richard Lupton and William Blocker for $33. 33⅓, and costs, on an estray bond executed by Lupton as principal, and Blocker as security, upon the taking up of an estray, in the county of Pike, by Lupton. That on the 13th May, 1845, an execution was regularly issued on said judgment, directed to the sheriff of Pike county, and on the same day came to the hands of the defendant, who was sheriff of said county, to be executed. That defendant, as such sheriff, on the 21st June, 1845, by virtue of said execution, took the mule in the declaration mentioned as the property of Lupton and Blocker to satisfy the execution. That the plaintiff in this suit claimed the mule as his property, and he summoned a jury in due form of law to try the right of property, and the jury found that the property belonged to Lupton and Blocker, and was subject to the said execution; whereupon he proceeded to sell the mule according to law to satisfy the execution. Dickson became the purchaser, and he applied the money arising from the sale in satisfaction of said execution, &c., &c. Wherefore, &c.

Plaintiff demurred to this plea, on the following grounds: 1st. The plea shows no valid judgment; 2d. The County Court had no jurisdiction of the subject matter of the judgment set out in the plea; 3d. No profert is made of the execution; 4th. The matters set up in the plea constitute no bar to the action, &c.

The court sustained the demurrer: the cause was submitted to a jury on an issue to the plea of not guilty, and verdict and judgment for plaintiff for $60.

Pending the trial, defendant took a bill of exceptions, from which it appears:

Plaintiff proved that he bought the mule about four months prior to the time the defendant seized it of one McLaughlin; and that the

defendant seized and took the mule out of the possession of plaintiff's son, who was riding it by permission and direction of the father, and sold it at public vendue; also proved the value of the mule.

Defendant then introduced McLaughlin, who deposed that he knew the mule in question, and delivered it to plaintiff.

Defendant. Of whom did you receive the mule and what did you pay for it?

Plaintiff objected to the question, the court sustained the objection, and defendant excepted.

Defendant. What was the value of the mule?

Witness. Fifty dollars.

Defendant. Did you own the mule? Plaintiff objected to this question, the court sustained the objection, and defendant excepted.

Defendant. When you delivered the mule to plaintiff, did you inform him that you had no title to it, and that he must run all risks as to title? The court overruled this question also, and defendant excepted.

Defendant. Who was the owner of the mule when you delivered it to plaintiff?

Witness. I exercised acts of ownership over the mule, and considered that I owned it, or I should not have traded her. I had the mule in possession about a year.

Defendant. At the time you delivered the mule to plaintiff, was, or was not, it the property of Richard Lupton, and did not he put the mule in your possession to pay a claim owing by him to the county of Pike, in consequence of his having posted said mule as an estray? The court overruled this question, and defendant excepted.

Defendant introduced another witness, and asked him: What did plaintiff say as to the purchase of the mule from McLaughlin, and for what purpose did he obtain said mule? Which question the court overruled, and defendant excepted.

Defendant. Who owned the mule when plaintiff traded for her?

Witness. I do not know of my own knowledge.

Defendant. To whom did McLaughlin say the mule belonged at and before the time it was traded to plaintiff? The court overruled this question, and defendant excepted.

Defendant. Whom did the plaintiff say the mule belonged to before he traded for it? Overruled by the court, and defendant excepted.

Defendant brought error.

FOWLER, for the plaintiff. The decisions of the court upon the evidence, and its refusal to let the witnesses answer the questions propounded on the part of Huddleston, are erroneous, because:

1. Evidence which has a tendency to disprove the facts which the other party is attempting to establish, is admissible, particularly if such evidence can be drawn from the witness of the other party. 6 *Missouri Rep.* 155, *Davis* v. *Cooper.* 2 *Saund. Pl. & Ev.* 856.

2. *Prima facie* evidence, bearing on a point in issue, is sufficient to base a verdict upon, and the exclusion of it is erroneous. 5 *Ark. Rep.* 243, *McLane's adm'r* v. *Churchill et al.*

3. In trespass under the general issue the defendant may in all cases give evidence of title. 7 *Tevm Rep.* 350, *Dodd* v. *Kyffin.* 8 *Term Rep.* 405, *Argent* v. *Durant.*

4. In trespass under the general issue, the defendant may show that the chattels in controversy, were not the plaintiff's property. 2 *Saund. Pl. & Ev.* 856, 861. 1 *Tenn. Rep.* 480, *Smith* v. *Miller.* 2 *Ark. Rep.* 576, *Sevier* v. *Holliday.*

Huddleston's plea of justification was in law technically a good one, and the demurrer to it ought to have been overruled. The plea was even better and proposed to prove more than the law required of the defendant. And first as to the alleged judgment's having been rendered by a court of competent jurisdiction. This court has decided that the Legislature has power to vest in other courts a jurisdiction concurrent with the Circuit Court, over all matters of contract, of which it has cognizance by the Constitution, except where the sum in controversy is over one hundred dollars. 2 *Ark. Rep.* 455, *Dillard* v. *Noel's adm'r, &c.*

The judgment, &c., set up by Huddleston was rendered by the County Court on an estray bond for less than one hundred dollars. And the Legislature has expressly conferred jurisdiction in such cases

on the County Court. *Rev. Stat., p.* 369, title "Estrays," *sec.* 25 *et seq.*

The plea sufficiently and fully sets out the execution and even its return, and what lawyer ever before heard of the necessity of making "profert" of an execution? And where the court has jurisdiction the sheriff may justify even under a defective execution; much more where it is only defectively set out. 6 *Missouri Rep.* 40, *Hickman* v. *Griffin.*

As to the defence of the sheriff, it is wholly immaterial whether Lupton and Blocker had notice or not before judgment was rendered against them. If the execution itself shows a judgment within the jurisdiction of the court, it was all that was necessary to a full justification of the sheriff. 6 *Mo. Rep.* 40, *Hickman* v. *Griffin. ib.* 155, *Davis* v. *Cooper.* 2 *Saund. Pl. & Ev.* 516, 792. 1 *N. Car. Rep.* 340, *Warner* v. *Cryer & Moore.*

The sheriff is not bound to set out the judgment in his plea. 4 *Mo. R.* 3, *Burton* v. *Sweaney.* 1 *Salk. Rep.* 409, *Britton* v. *Cole.*

The sheriff is not bound, nor has he even a right to compare the execution with the judgment. He is bound to obey the writ. 4 *Mo. Rep.* 3, *Benton* v. *Sweaney.*

RINGO & TRAPNALL, contra. The record presents two principal questions for the consideration and judgment of this court: one arising upon the demurrer to the plea of justification; the other upon the refusal of the court to suffer the witnesses of Huddleston to answer certain questions propounded to them by him.

The former depends upon two propositions: 1st. Had the County Court of Pike county jurisdiction of the subject matter, to adjudicate upon the bond given by the taker up of an estray in said county and pronounce judgment thereupon between the parties? and 2d. Does the plea in apt and legal form set forth a valid recovery in favor of the State of Arkansas, for the use of the county of Pike, against Lupton and Blocker, and show a valid execution issued thereupon, by virtue and authority whereof said Huddleston levied on and sold said mule?

The defendant in error denies the authority of the Legislature to

vest in the County Court any jurisdiction whatever not vested in it by the Constitution, and that it possesses any jurisdiction to adjudicate and determine any controversy between the parties to any matter of contract whatever. *Const. Ark., Art.* VI, *sec.* 3, 9. *County of Pulaski* v. *Irvin,* 4 *Ark. R.* 473. *Heilman* v. *Martin,* 2 *Ark. R.* 158.

The rule is believed to be universal that a party justifying under legal process, must show the process, or, in his pleading set it out so as to show that in point of law, he acted under a valid authority; which the plea here wholly fails to do, for it neither sets out the alleged writ, nor so much as avers that it was signed by the clerk or sealed with the seal of the court: so that all the facts stated may be true and the pretended writ have been a mere nullity. But the plea states that the judgment was based upon a contract, a bond given by the taker up of an estray, and so affirmatively shows that it was a matter within the exclusive cognizance of a justice of the peace; and that the writ issued thereon was a nullity for the want of jurisdiction in the County Court over the subject matter. *Dillard* v. *Noell,* 2 *Ark. Rep.* 454. *Pryor* v. *Clay,* 2 *Eng. Rep.* 96. *Harrison* v. *Davis,* 2 *Stew.* 350.

As to the questions presented by the bill of exceptions, the defendant insists that the court very properly rejected the testimony offered by the plaintiff in error, because it was no justification to prove that the legal title to the property was in a stranger, without proving also that the defendant acted under the authority of the owner, which in this case, was not attempted or pretended. The proof establishes the actual and lawful possession in Spear by virtue of his purchase of the property for a valuable consideration; and if he was not the rightful owner, no person beside the rightful owner, or those acting under his authority, could lawfully intermeddle with or take the property from him, without his consent: or justify the taking by simply showing as was attempted in this case, that the mule was not the property of Spear, but the property of a stranger. *Root* v. *Chandler,* 10 *Wen.* 110. *Drake* v. *Barrymore,* 14 *Johns. Rep.* 166. *High* v. *Wilson,* 2 *Johns. Rep.* 46. *King* v. *Dunn,* 21 *Wend.* 253. *Dornick* v. *Chapman,* 11 *Johns Rep.* 132. *Starkie Ev., vol.* 3, *p.* 1438, 1462, 1463.

JOHNSON, C. J. The question first presented related to the legal sufficiency of the plea of justification. The defendant below, by this plea, attempted to shelter himself under legal process, and in order to do so he must show that such process was based upon a valid judgment. If the judgment set up be void for the want of jurisdiction in the County Court, then it is clear, and the authorities agree upon the point, that the execution could afford no protection to the officer. An officer may justify under erroneous proceedings, when there is no defect of jurisdiction. *Suydam* v. *Kings,* 13 *J. R.* 444. Where a court has jurisdiction of the subject matter, it is sufficient to justify the officer executing its process, for the officer is not bound to examine into the validity of its proceedings or the regularity of its process. *Warner* v. *Shed,* 10 *J. R.* 138. We will now proceed to ascertain whether the County Court of Pike possessed jurisdiction over the subject matter, and was authorized to render the judgment upon which the execution was predicated. This court in the case of *Dillard* v. *Noel,* (2 *Ark. R.* 454), said "that all the courts of this State derive the whole of their jurisdiction from the constitution and statutes passed in conformity with the provisions thereof, is a proposition which, in our judgment, cannot be denied, for they are all created or their creation specially provided for by the constitution; and their respective jurisdiction is in many respects expressly defined and limited by the same instrument; yet in some respects it is subjected to the control of the Legislature, and may be from time to time distributed by statute, according to the will of that department, among the several judicial tribunals not prohibited by the constitution from taking cognizance thereof. In regard to matters of contract the jurisdiction of the justices of the peace is definitely and definitively prescribed by the constitution, so far as it depends upon the sum in controversy, and in this respect the power of the Legislature over the subject is confined or restricted; so likewise, it is in regard to the jurisdiction of the Circuit Court, except that the latter is not made exclusive, and therefore it is competent for the Legislature to vest in other judicial tribunals a jurisdiction concurrent with that of the Circuit Court over all matters of contract of which it has cognizance, although it is not within the power of that department to divest the Circuit Courts of their original juris-

diction conferred upon them by the constitution in matters of contract where the sum in controversy is over one hundred dollars, or in any manner restrict or prohibit their exercise thereof, so far as it depends upon the sum in controversy. On this subject the language of the constitution is, that the Circuit Court shall have 'original jurisdiction of all civil cases which shall not be cognizable before the justices of the peace until otherwise directed by the General Assembly, and original jurisdiction in all matters of contract where the sum in controversy is over one hundred dollars,' and that justices of the peace 'shall have individually, or two or more of them jointly, exclusive original jurisdiction in all matters of contract except in actions of covenants, where the sum in controversy is of one hundred dollars and under." It is clear from this case that the Legislature possesses no power under the constitution, to confer jurisdiction upon the County Courts, in matters of contract, except covenant, where the sum in controversy is of or under one hundred dollars. The *7th sec. of chap.* 68 of the *Revised Statutes,* declares that "every person taking up any animal shall at the time of the appraisement thereof, enter into bond with sufficient security, to be approved by the justice, in the value of such animal, to the State of Arkansas, for the use of the proper county, conditioned that if the owner of such animal shall within one year from the date thereof, appear and prove his property in the animal so taken up, that he will deliver up such animal; or if such owner shall fail to prove his property therein within one year, that he, the obligor, will pay into the county treasury, the one-half of such appraised value, stating the amount of such appraisement;" and the 26, 27 and 28 sections also provide that "after the term of one year from the taking up of any beast, if the order of the justice requiring the taker up of such beast to return the animal to the owner, with the owner's receipt thereon, shall not be filed with the clerk, or the one-half of the appraised value paid into the treasury, and the county treasurer's receipt filed with the clerk, such clerk shall issue a notice to the delinquent to appear at the next term of the County Court for such county, and show cause, if any he can, why judgment shall not be entered against him in favor of the State for the benefit of the county; that such notice shall be by the clerk delivered to the sheriff, and by him served

on such person, and that if no sufficient cause be shown, the court shall enter judgment against the delinquent for the amount due the county with costs; and execution shall issue for the same as in other cases, and further, that the cause shall be tried without the necessity of formal pleading." The County Court under the statute is only anthorized to enter judgment against the taker up of the estray for the one-half of the appraised value. The execution which is said to be founded upon the recovery in the County Court, commanded the defendant, as sheriff, to make the sum of thirty-three dollars and thirty-three and one-third cents, for the debt, and three dollars and fifteen cents for the cost of said suit. This sum is supposed to be the one-half of the appraised value of the mule, and that is clearly the sum in controversy. It appears affirmatively therefore that the suit was for a sum within the exclusive jurisdiction of a justice of the peace, and consequently not within that of the County Court. The subject matter of the suit not being within the jurisdiction of the County Court, it follows as a necessary consequence, that the execution based upon the judgment could afford no protection to the officer executing it. The demurrer was therefore properly sustained to the defendant's special plea of justification. The next and last point to be considered is, whether the court decided correctly or not in excluding certain evidence offered by the defendant below. In the case of *Cook* v. *Howard,* (13 *J. R.* 283), the Supreme Court of the State of New York, said that "In an action of trespass *de bonis asportatis* it is not competent for the defendant to show property in a stranger to excuse the trespass and justify the taking. If a person has the peaceable possession of a chattel, this gives him a right as against every body but the rightful owner. In an action of trover the defendant may show a title in a third person (11 *Johns Rep.* 559;) but it is expressly laid down by this court in *Derrick* v. *Chapman, (*11 *J. R.)* 132, that the possession of a chattel is *prima facie* evidence of right, and that a mere stranger could not deprive the party of that possession without showing some authority or right derived from the owner to justify the taking." The same court (in the case of *Derrick* v. *Chapman,* 11 *J. R.* 132) also said that "the possession of the property by the plaintiff below, was *prima facie* evidence of right, and a mere stranger

could not lawfully deprive him of that possession. The offer therefore, to prove that the property belonged to Ralph Chapman, could not excuse the taking by the defendant without showing some authority or right derived from Ralph Chapman amounting to a justification, and this was not admissible under the general issue. The taking was prima facie a trespass; and the excuse that it was done by virtue of an attachment issued by a justice of the peace, ought to have been pleaded specially. Lord Coke lays it down, *Co. Lit.* 282; 2 *Esp. R. P.* 558; as an established rule of the common law, that if a defendant hath cause of justification or excuse, he must plead it, and cannot give it in evidence under the general issue. This is a rule well settled in actions for false imprisonment, and assault and battery (3 *Wills* 270), and the reason for the rule applies in this case, it being necessary to prevent surprise, and to enable the parties to go to trial on equal terms with respect to evidence and proof of facts. The transfer of the property, although with a design to defraud creditors, was valid as between the parties. And the defence founded on the right of a creditor to defeat it by attachment, or by a judgment and execution, is very special and ought to be disclosed by pleading." The defendant below, after the plaintiff had rested his case, introduced witnesses in his defence, and propounded numerous questions, to all of which objections were made and which objections were sustained by the court. He made no attempt to show that the plaintiff was not possessed of the property before the seizure by the defendant, but on the contrary, he tacitly admitted that fact; but, in order to evade the force and effect of it, endeavored to prove either that such possession was fraudulent, or that though it was fair and *bona fide*, yet that the title was in a stranger. This being the end and scope of the testimony that the defendant proposed to introduce, the principle laid down in the cases referred to, are perfectly conclusive upon the question, and fully sustained the court below in excluding the whole of it from the jury. The judgment of the Circuit Court is therefore in all things affirmed.