STATE *vs.* HAWKINS.

Under existing Statutes, it requires sixteen legally qualified men to constitute a lawful Grand Jury, and an indictment found by a less number is invalid. *(a)*

Though by *Sec.* 83, *Chap.* 52, *Digest,* an indictment may be found by the concurrence of not less than twelve of the Grand Jurors, yet the panel must consist of sixteen lawful men.

Therefore, where the defendant pleaded in abatement to an indictment that one of the Grand Jurors by whom the indictment was found, was not a house-holder or free-holder of the county, a replication to such plea, alleging that besides the person so disqualified (and one other) the indictment was found by the concurrence of fourteen good and lawful Jurors of the panel, is bad on demurrer.

Writ of Error to Pulaski Circuit Court.

Indictment against Jacob Hawkins for keeping a gaming table, determined in the Pulaski Circuit Court, at the October Term, 1848, before the Hon. WM. H. FIELD, Judge.

Defendant filed a plea in abatement as follows:

"And the said Jacob Hawkins in his own proper person cometh into Court here, and having heard the said indictment read, saith that the said Richard L. Galloway, jr., who was one of the Grand Jurors by whom the said indictment was found and return-

---

(a)—See also *The State vs. Wm. Brown, jr., post.*

ed into Court here a true bill, was not, when said Grand Jury was empanelled, nor at any time thereafter, unto, nor at the time when said indictment was so found and returned into Court here, a free-holder or house-holder in said county of Pulaski, and this he is ready to verify; wherefore he prays judgment of the said indictment, and that the same may be quashed."—*Pike.*

To which plea the Attorney General replied as follows:

"And the said State, by her Attorney here prosecuting, as to the said plea of the said defendant by him above thereof pleaded, says that the said indictment ought not to be quashed by reason of any thing in the said plea alleged, because she says that over and above and besides the said Richard L. Galloway, jr., and one Elias Good, the panel of the said Grand Jurors, who found and returned the said indictment, consisted of more than twelve good and lawful men of said county of Pulaski, namely: Elijah A. More, &c.,[*here follows the names of thirteen others*] fourteen good and lawful men of said county, each of whom, at the time said Grand Jury was empanelled, and thence until, and when said indictment was found and returned, was a free white male citizen of this State, over the age of twenty-one years, a resident of said county, a house-holder or a free-holder, and otherwise qualified according to law; all of whom were returned on the said panel according to law, and were duly empanelled sworn and charged to serve as Grand Jurors of said State to enquire in and for said county, at the April Term of this Court for the year 1848; and that all the aforenamed Grand Jurors over, above and besides the said Richard L. Galloway, jr., and Elias Good, concurred in finding and returning the indictment in manner aforesaid, and this she is ready to verify; wherefore she prays judgment, &c."—*Watkins.*

The defendant demurred to the replication; the demurrer was sustained; the Attorney General rested, and the Court rendered final judgment that the indictment be quashed, &c.

The State brought error.

WATKINS, Attorney General.

PIKE, *contra,* referred to *Sir William Withpole's case, Cro. Car.* 134, 147. *Fines vs. Norton, ib.* 278. *Briggs vs. Georgia,* 15 *Vermont* 71. *The State vs. Babcock,* 1 *Conn.* 401. *Commonwealth vs. Parker,* 2 *Pick.* 550. *The State vs. Williams,* 5 *Porter* 130. *McQuillen vs. The State,* 8 *Smedes & Marsh.* 587. *Rawles vs. The State, ib.* 609, to show that a Grand Jury composed of members who do not possess the requisite qualifications, have no power to find a valid indictment, and that the objection might be taken by plea. For the number of Grand Jurors: *Dig. ch.* 52, *sec.* 64, *ch.* 94, *sec.* 7.

MR. CHIEF JUSTICE JOHNSON, delivered the opinion of the Court.

The legal effect of the replication of the State to the defendant's plea in abatement is to admit the existence of the fact set up in the plea, but in avoidance to charge that, notwithstanding such disqualification, there were a sufficient number of Grand Jurors concurring in the finding of the bill to constitute it a good and valid indictment. The only question then that is presented, is whether an indictment found by fourteen Grand Jurors only, is a good and valid indictment. The 64th Sec. of Chap. 52, of the Digest, declares that "There shall be not less than 16 persons sworn on any Grand Jury," and the 7th Sec. of Chap. 94 also declares that "Not more nor less than sixteen Grand Jurors shall be summoned to attend any one Court." It is perfectly clear and unquestionable, therefore, that no less number than sixteen can be said to be a lawful Grand Jury, and as a necessary consequence, an indictment preferred by a less number cannot be a good and valid indictment. True, it is, that the 83d Sec. of Chap. 52 declares that no indictment shall be found without the consent of at least twelve Grand Jurors. This provision of the Statute is merely directory to the Grand Jury, and notwithstanding it does not absolutely require the concurrence of more than twelve of the body, yet it contemplates and presupposes that there are at least sixteen to the panel, as that is the least number recognized by the law.

The Circuit Court therefore decided correctly in sustaining the

demurrer to the replication and quashing the indictment. The case is consequently affirmed.