

American Land Company vs. Grady et al.

of the company, with the understanding, express or implied, that it should be taken as part of the consideration, and so credited. Such sums would be all in effect paid as part of the consideration, and would be considered as damages.

Both these rights combined in complainants. They were entitled to indemnity for the judgment paid by them, and to other damages on failure to perform the contract, which Smith might have claimed if he had brought the suit. Smith is in the suit and assents to this. All the matters grow out of the transactions resulting from the title-bond and the agreement concerning the suit, and the whole relief was properly sought in one bill.

There was no specific prayer for the \$100 paid Aldridge, nor was the master specifically directed to take an account of it. But there was a prayer for *damages*, and the account of the master might properly include it as part of the consideration. No proof was returned with the master's report. The reference, the report and the decree appear all to have been made on the same day, and are recited in the same decree. Some of the items of the report concerning costs, were easily ascertainable upon the spot. Some facts are wanting to show periods affecting calculations of interest, and there are other minor irregularities. It was hasty practice, and somewhat careless. But the parties were all in court, and no one filed exceptions, or asked time to do so. Enough appears from the evidence used on hearing to show that the sum total was within the limits of what complainants might well claim, and we presume the Chancellor thought, as he might well, that substantial justice would be done by the decree.

As for the attachment, our code provisions are broad enough to authorize such a proceeding in an equitable suit. It is the prevailing practice in Kentucky and other States having laws similar to ours. It has been adopted and used here by mem-

Wilson vs. State of Arkansas.

bers of the bar, and has heretofore passed *sub silentio* under the notice of the court. Although it does not belong to the traditional system of equity practice, as adopted here under our territorial government and transmitted to the State, it commends itself to the court as proper under the statutory provisions embracing all civil actions.

Affirm the decree.

## WILSON V. STATE OF ARKANSAS.

1. **CRIMINAL PLEADING:** *Indictment, when should negative exceptions in a statute.*  
When there is an exception in the enacting clause of a statute, it must be negatived in the indictment, but when a statute contains *provisos* and exceptions in distinct clauses it is not necessary to state that the defendant does not come within the exceptions, or to negative the *proviso* it contains.
2. **EVIDENCE:** *Declarations of prisoner. Res gesta.*  
The statements of a defendant of his intended use of a pistol at the time he borrowed it of the witness, and a like statement when he exhibited it to another witness, were admissible in evidence as part of the *res gesta*.
3. **CRIMINAL LAW:** *Carrying weapons: Constitutional right to bear arms.*  
The Legislature may to some extent regulate the mode and occasion of wearing war arms, but to prohibit the citizen from wearing or carrying a war arm except upon his own premises or when on a journey, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.

APPEAL from *Arkansas* Circuit Court.

Hon. J. A. WILLIAMS, Circuit Judge.

ENGLISH, C. J. :

Chaney Wilson was indicted in the Circuit Court of Arkansas county, at March term, 1878, as follows :

"The grand jury, etc., etc., accuse Chaney Wilson of the crime of carrying side arms, committed as follows, to-wit: The said Chaney Wilson in the county aforesaid, on or about

Wilson vs. State of Arkansas.

the 14th day of February, 1878, did then and there unlawfully carry a pistol as a weapon, contrary to the statute in such case made and provided, and against the peace and dignity of the State," etc.

The defendant demurred to the indictment, the court overruled the demurrer, he was tried and convicted, a new trial was refused him, and he took a bill of exceptions and appealed.

I. It is submitted for appellant that the indictment is bad, because it does not negative the exceptions contained in the *proviso* of the act under which it was preferred. *Acts of 1874-5, p. 155.*

When there is an exception in the enacting clause of a statute it must be negatived; but when a statute contains *provisos* and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the *proviso* it contains. *Britton v. State, 10 Ark., 301; Matthews v. State, Ib. 485; Shaver v. State, Ib. 259; Bone v. State, 18 Ib. 113; 1 Wharton Cr. L. (6 Ed.) p. 378.*

The enacting clause of the statute makes it a misdemeanor, punishable by fine, for any person to wear or carry as a weapon, any pistol, dirk, butcher or bowie knife, sword or spear in a cane, brass or metal knucks, or razor. In a *proviso*, exceptions are made in favor of persons on their own premises, or travelling through the country on a journey with baggage, officers of the law engaged in the discharge of official duties, or persons summoned by an officer to assist in the execution of process, or a private person authorized to execute process.

It is sufficient for the indictment to charge the offense prohibited by the enacting clause of the statute, and if the accused is within any of the exceptions mentioned in the *proviso*, it is matter of defense.

Wilson vs. State of Arkansas.

It follows that the court below did not err in overruling the demurrer to the indictment.

II. It was proven on the trial that appellant borrowed of witness, Bowers, a large army size six shooter, a revolving pistol, 44 caliber, eight inches in the barrel, such as is commonly used in warfare, stating at the time he borrowed it, that he was going over to Pearman's to shoot wild hogs. On the next day he went to Pearman's, stated to him the purpose of his visit, and while conversing with him, before going into dinner, pulled the pistol out of his boot, cocked it a few times to see if it would revolve, and then put it around under his coat, and went in to dinner.

The court excluded from the jury the statement made by the appellant to Bowers, when he borrowed the pistol from him, as to the use he intended to make of it, and a like statement made by appellant at Pearman's where he took the pistol from his boot in his presence, etc. These declarations were admissible as part of the *res gestæ*. *Pitman v. State, 22 Ark., 357.*

III. The appellant, among other instructions, asked the court to charge the jury that if they believed from the evidence, that the pistol carried by him was an army size pistol, such as are commonly used in warfare, they should acquit; which was refused by the court.

In *Fife v. State, 31 Ark., 455*, on review of authorities, we held that the Legislature might constitutionally prohibit the carrying of such pistols and other arms easily concealed about the person, as are used in quarrels, brawls and fights between maddened individuals, but that the Constitution guaranteed to the citizens the right to keep and bear arms for defense, etc.

And it was indicated in the opinion that the Legislature might, in the exercise of the police power of the State, regulate the mode of wearing war arms, and no doubt the occasions of wearing such arms may be to some extent regulated.

Holland vs. The State.

Thus it has been made an offense to wear a pistol, etc., concealed (*Gantt's Dig.*, sec. 1517) and this may well apply to the character of the pistol used as a war arm.

So hunting with a gun with intent to kill game, or shooting for amusement, on the Sabbath, are made offenses. *Gantt's Dig.*, sec. 162.

No doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections, etc. *Andrews v. State*, 3 *Heiskel*, 182.

But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey traveling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.

If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.

The judgment is reversed and the cause remanded for a new trial.

## HOLLAND V. THE STATE.

CRIMINAL LAW: *Carrying weapons.*

The carrying of army sized pistols, such as are commonly used in the military and naval service of the United States, is not prohibited by the laws of Arkansas.

APPEAL from *Yell* Circuit Court.

HON. W. W. MANSFIELD, Circuit Judge.

ENGLISH, C. J.:

James Holland was indicted in the Circuit Court of *Yell* county, for carrying a pistol as a weapon.

Clary et al vs. State of Arkansas.

On the trial but one witness was examined. He stated, in substance, that the first time he ever saw defendant, was on the 1st of October, 1875, in *Yell* county. He had two large sized six shooting pistols, one of them a Remington, navy size and loaded, and the other a Colt's army pistol. The pistols were such as are commonly used in the United States military and naval service. Defendant was carrying them in his saddle-bags, and stated he was from Texas. Witness did not know whether he was on a journey or not.

Upon this evidence, the defendant asked the court to charge the jury that if they found from the evidence that the pistols, proven to have been carried, were army sized pistols, and were such as are commonly used in the United States military and naval service, they must acquit defendant.

The court refused this instruction, defendant was convicted, a new trial refused him, he took a bill of exceptions and appealed.

The court erred in refusing to instruct the jury as moved by appellant. *Fife v. State*, 31 Ark., 455: *Wilson v. State*, M. S.

Reversed, and remanded for new trial.

## CLARY ET AL V. STATE OF ARKANSAS.

1. CRIMINAL LAW: *Robbery—Value immaterial.*

To constitute robbery the taking must be either directly from the person or in the presence of the party robbed, and must be by force, or a previous putting in fear. It is the previous violence or intimidation that distinguishes robbery from larceny. It is immaterial of what value the thing taken is.

## 2. INDICTMENT FOR ROBBERY.

In an indictment for robbery it is sufficient to allege that the taking was done by violence, without alleging intimidation.