shall be deemed murder in the second degree. Here the terms used in the indictment cannot reach an offence the description of which is not reached by common law definition, unless, indeed, we intend after conviction that the finding contrary to what the jury have expressed shall reach another crime neither in the bill of indictment nor verdict; for the finding is "guilty of murder in manner and form as charged in the bill of indictment." If, then, the verdict refers us to the indictment for the facts found, it must be seen by reference to the indictment, that it can be but murder in the second degree; for it is nowhere supported by the terms used in the indictment, or in the finding of the jury, when compared with the description of murder in the first degree as given in the statute.

I will admit for the sake of argument, that the charge in the bill of indictment, aided, as some suppose it is, [356] by the 72d section, will be sufficient; still to justify a judgment for the most heinous of the two murders, the jury should find in their verdict the manner. If by poison, say so; if willful, deliberate, malicious and premeditated, say so; and the like of any other one of the different species of murders in the first degree.

Surely the court will require certainty from some quarter, before they will give a judgment affecting life; and in any aspect in which this case can be viewed, upon the pleadings, the charge of the court or finding thereon, there is no such certainty, and not enough to justify the judgment rendered.

Where he pleads guilty, the law had two objects in view: 1. In tenderness to the accused; and 2d. To prevent one getting off by pleading guilty of the lesser offence when in fact he was guilty of the higher offence. I am for reversing the judgment.

Judgment reversed.

SIMPSON *v.* THE STATE OF TENNESSEE.

Sparta, December, 1833.

CRIMINAL LAW—AFFRAY—INDICTMENT. An affray is the fighting together of two or more persons in a public place, and an indictment which charges that the defendant "an affray did make," without stating the facts which constitute an affray, is fatally defective. [Acc. State *v.* Priddy, 2 Hum. 161, citing this case.]

At the May term of the circuit court for the county of White, an indictment was found against the plaintiff in error, in substance as follows: The grand jurors for the state, etc., upon their oath, present that William Simpson, [357] laborer, on the first day of April, in the year of our Lord, 1833, with force and arms, at the county of White, aforesaid, being arrayed in a warlike manner, then and there in a certain public street and highway situate, unlawfully, and to the great terror and disturbance of divers good citizens of the said state, then and there being, an affray did make, in contempt of the laws of the land, to the evil example of all others in the like case offending, and against the peace and dignity of the state. To this indictment the plaintiff in error pleaded not guilty; upon which issue was joined, and the cause submitted to a jury, who found him guilty in manner and form as charged in the indictment. The plaintiff in error moved in arrest of judgment, and filed his reasons, which upon argument was overruled by the court, and a bill of exceptions taken thereto. The court gave judgment that the plaintiff in error pay a fine of $20 for his offence, and also pay the costs of the prosecution. From this judgment, an appeal in error is taken to this court.

Wm. B. Campbell, Attorney-general for the State.

WHYTE, J. On the argument in this case, it is contended by the counsel for the plaintiff in error, that the record does not present any charge that is known to the law, as cognizable in our courts by indictment. On the part of the state, the attorney-general contends that the offence of an affray is sufficiently charged in and by the indictment. Authorities have been cited on this question, and books of forms of indictments for affrays have also been referred to, for the purpose of showing that the form of the charge in the present indictment is a valid one for the offence of an affray, which will now be noticed. Blackstone, in the fourth volume of his Commentaries, page 145, says, "Affrays, from affrayer, to terrify, are the fighting of two or more persons, in some public place, to the terror of his majesty's subjects; for [358] if the fighting be in private, it is no affray, but an assault." It will be observed, that according to this definition of an affray by Blackstone, three things are necessary to constitute it. First. There must be fighting. Second. This fighting must be by or

between two or more persons. And, Third. It must be in some public place to cause terror to the people. Hence it must follow, that if either of these requisites are wanting, an affray does not exist. In the charge in this indictment, which is assumed to amount to an affray by its constitution, the two first of the above requisites are wanting, to wit, fighting or actual violence, and the number of persons necessary for the constitution of it. To obviate this, and to prove that these particulars are not essential, Serjeant Hawkins is cited and relied upon, book 1, ch. 28, sec. 4, where he says, "But granting that no bare words in the judgment of law carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray where there is no actual violence, as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes." It is to be remembered on this citation, that if the whole of the section, and the following ones of the chapter, are looked into, it will be found that the doctrine of the citation depends upon ancient English statutes, enacted in favor of the king, his ministers and other servants, especially upon the statute of the 2d Edward III, which enacts, that no man, great nor small, of what condition soever he be, except the king's servants, etc., shall go or ride armed by night or by day, etc. The book goes on and says, that persons of quality are in no danger of offending against this statute by wearing their common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places and upon occasions in which it is the common fashion [359] to make use of them without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. It may be remarked here, that ancient English statutes, from their antiquity and from long usage, were cited as common law; and though our ancestors, upon their emigration, brought with them such parts of the common law of England, and the English statutes, as were applicable and suitable to their exchanged and new situation and circumstances, yet most assuredly the common law and statutes, the subject-matter of this fourth section, formed no part of their selection. The true construction of the portion of the fourth

section above cited is giving it an application to particular persons in particular places, under particular circumstances; this is proved by what Serjeant Hawkins has laid down previously in the first and second sections of the same chapter, under the same head, where he gives the general rule, concurring in substance with Blackstone. He says: "From this definition, it seems clearly to follow, that there may be an assault which will not amount to an affray, as where it happens in a private place, out of the hearing or seeing of any except the parties concerned, in which case it cannot be said to be to the terror of the people; and for this cause, such private assault seems not to be enquirable in a court, but as all affrays certainly are, as being common nuisances." This passage concurs with and supports Blackstone in the above two particulars of actual violence, and the plurality of the persons concerned as actors, which it was assumed the citation from this fourth section dispensed with. The like deduction may be drawn from the second section, where it is laid down, "that no quarrelsome or threatening words whatsoever shall amount to an affray, and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows." But suppose it to be assumed on any ground, that our ancestors adopted and brought over with them this English statute, [360] or portion of the common law, our constitution has completely abrogated it; it says, "that the freemen of this state have a right to keep and to bear arms for their common defence." Article 11, sec. 26. It is submitted, that this clause of our constitution fully meets and opposes the passage or clause in Hawkins, of "a man's arming himself with dangerous and unusual weapons," as being an independent ground of affray, so as of itself to constitute the offence cognizable by indictment. By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived, that it would be going much too far, to impair by construction or abridgment a constitutional privilege which is so declared; neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people

to be incurred thereby; we must attribute to the framers of it the absence of such a view.

On the authorities, therefore, I am of opinion that this record of an indictment against the plaintiff in error does not contain the charge of an affray, or any other specific offence cognizable at common law by indictment, and that there is nothing either in our constitution or acts of Assembly in repugnancy to this conclusion, but, on the contrary, strongly corroborative thereof: I will notice the precedents of the forms of the offence of an affray that have been introduced by the attorney-general as evidences of the law in reference to the indictment in the record. These precedents have been introduced: one from Archbold's Criminal Pleading, page 337; another from Henning's Virginia Justice, page 23; and the third volume of Review of the Criminal Law, page 261. These precedents have been introduced for the purpose of supporting the present indictment, from their sameness to it, [361] or identity of form and charge. It will be remembered that the present indictment charges that William Simpson, laborer, with force and arms being arrayed in a warlike manner, in a certain public street or highway situate, unlawfully, and to the great terror and disturbance of divers good citizens, did make an affray in contempt of the law, etc., making the plaintiff in error, William Simpson, the only actor. All the three precedents introduced, however, state a plurality of actors in making the affray, naming them with their additions, as A. O., tailor, and B. O., blacksmith, and with force and arms did make an affray, pursuant to the doctrine laid down by Blackstone, and therefore they do not support the present indictment; but all are also defective in their not stating the acts in which the affray consisted, as the fighing of the actors, the inflicting of blows by them or the commission of some other act or acts of violence, stating in what they consisted. Chitty, whose accuracy is well known, in his Criminal Law has given us a precedent of an affray as follows, in the charging part, to wit: "That the said C. D., in and upon them, the said J. B. and J. A., being then and there in the peace, etc., unlawfully and violently did make an assault and affray; he, the said C. D., did then and there, with force and arms, unlawfully and violently beat, wound and treat so ill, that their lives were greatly despaired of," etc. Here a certain specific charge is made, of unlawfully and violently beating and wounding certain persons, by name, with its degree, "so that their lives were greatly despaired of." But the charge, "made an affray," in this record, is altogether too general; it does not give that information to the court, or the party charged, which the law requires in conducting criminal proceedings. This information should consist in a fair development upon the record of the transaction, stating the material facts assumed to constitute the offence charged, so that the court may see whether a specified offence, cognizable by the law, is imputed; and if so, and a [362] conviction should follow, that it may be seen what judgment should be pronounced thereon. Such statement is also important to the party charged, that he may be prepared to make his defence, if he has any, and that his conviction or acquittal may enure to his future protection, should he be again charged on the same ground, and that he may be enabled to plead his previous conviction or acquittal of the same offence in bar of any subsequent proceedings. See 1st Chitty's Criminal Law, 169. Here, on this record, it is not stated that the plaintiff in error fought with any person, or committed any act of violence on any one, setting forth its nature, or that he inflicted blows on any person, with the attendant manner and circumstances, and also in each case naming the person or persons, if known, and if not known, stating that fact; all of which ought to appear in the charge, if they existed. As they do not so appear, their existence is not to be intended. And so it is laid down in the same book, page 172, which says, "The charge must be sufficiently explicit to support itself, for no latitude of intention can be allowed to include anything more than there is expressed." There is, therefore, error in the judgment of the circuit court, which must be reversed; and this court, proceeding to give such judgment as the circuit court should have given, direct the indictment to be quashed for its insufficiency.

CATRON, Ch. J., and GREEN, J., concurred.

PECK, J., *dissentiente*. Simpson was indicted for an affray. The charge is, that with force and arms, he, in a public place, an affray did make, to the terror of the people. He was convicted, and judgment was passed. The question now is, whether the indictment will sustain the conviction. There is no particu-

lar act charged as to the manner of the affray, nor does it seem to me important that the acts should be charged, though certainly it is safest to [363] insert them. The word affray is a technical term. If in a public place one commit such acts of outrage as produce terror, it is an affray. It must be charged to have been done in a public place, and to the terror of the people. So it is charged in this case. One can commit an affray, as by arming himself, rushing into a public place and threatening to kill. Though the words do not make the affray, yet the acts coupled with them will, if fear ensue, amount to an affray. Haw. P. C. title Affray, sec. 4. And though the charge be general, the facts may be proved. It is not true, as supposed, that to constitute an affray there must be a fighting of two in a public place. An assault by one in a public place will be an affray, though if in a private place, the same act would amount to nothing more than an assault. The indictment is not as full as could have been wished, but it is full enough to let in the evidence, has proved conviction, and that conviction ought to stand.

Judgment reversed.

NOTE. The dicta of Judge Whyte in this case, on page 360, upon the subject of the constitutional right of the citizen to bear arms, are commented on in Ayrnette v. State, 2 Hum. 161, and by Nelson, J., in Andrews v. State, 3 Heisk. 198. ED.

THE STATE *v.* TOLLS.

Sparta, December, 1833.

CRIMINAL LAW—INDICTMENT QUASHED—APPEAL BY STATE. An appeal by the State from the judgment of the county court quashing a presentment for gaming gives the circuit court jurisdiction of the case. [Acc. State v. Fields, Mar. and Yer. Rep. 137; State v. Smith. 2 Yer. 272; Code, § 5245.]

The grand jury found a presentment against the defendant for gaming, whether on the view of some of the jury, or upon the evidence of a witness, the face of the presentment does not show. The attorney-general for the State endorsed on the presentment, that it had been found on the evidence of John Argo, sworn in open court, [364] and sent to the grand jury. The county court

quashed it. The solicitor appealed, and the circuit court dismissed the appeal for want of jurisdiction.

Wm. B. Campbell, Attorney-general, for the State.

CATRON, Ch. J., delivered the opinion of the court.

The circuit court had jurisdiction of the case. State *v.* Fields, Martin and Yerger's Reports, 137.

The presentment is in due form, and must have been quashed because of the solicitor's endorsement. This, it is said, ought to have been done by the clerk, not the solicitor. The truth is, it could not be done by either. The act to suppress gaming, of 1824, ch. 5, sec. 2, authorizes and makes it the duty of the grand jury to send for witnesses, on whose evidence to ground presentments. What they proved the clerk has no right to know, and on whose information, whether witness or juror, the jury acted, is with them. It is the duty of the court to see there is no abuse, and if there be, to correct it by quashing the presentment; but this cannot be done on its face. The endorsement did no harm, nor could it have helped, had anything appeared amiss. The defendant is bound to answer to the presentment. The judgment of the circuit court and county court of Warren will be reversed and the cause remanded to the circuit court for trial.

Judgment reversed.

THE STATE OF TENNESSEE *v.* SIMPSON.

Sparta, December, 1833.

COSTS—STATE CASE—REVERSAL OF VOID JUDGMENT. Where a criminal case, brought up by the state, is reversed because the appointment of the judge who presided in the court below was unconstitutional, and his acts void, the state is entitled to costs. [See Officer v. Price, 5 Yer. 285, and Martin, *ex parte*, 5 Yer. 456.]

[365] The question in this case arose upon a motion to tax the costs. This cause had been tried before John H. Martin, esq., special judge. A judgment was pronounced in favor of the defendant, from which the state appealed. The appointment of said Martin, as special judge, and all his acts and judgments, as such, were pronounced by this court unconsitutional and void, and all the judgments rendered by him, reversed.[1] This cause

[1] See Smith *v.* Normant, *ante*, 271.