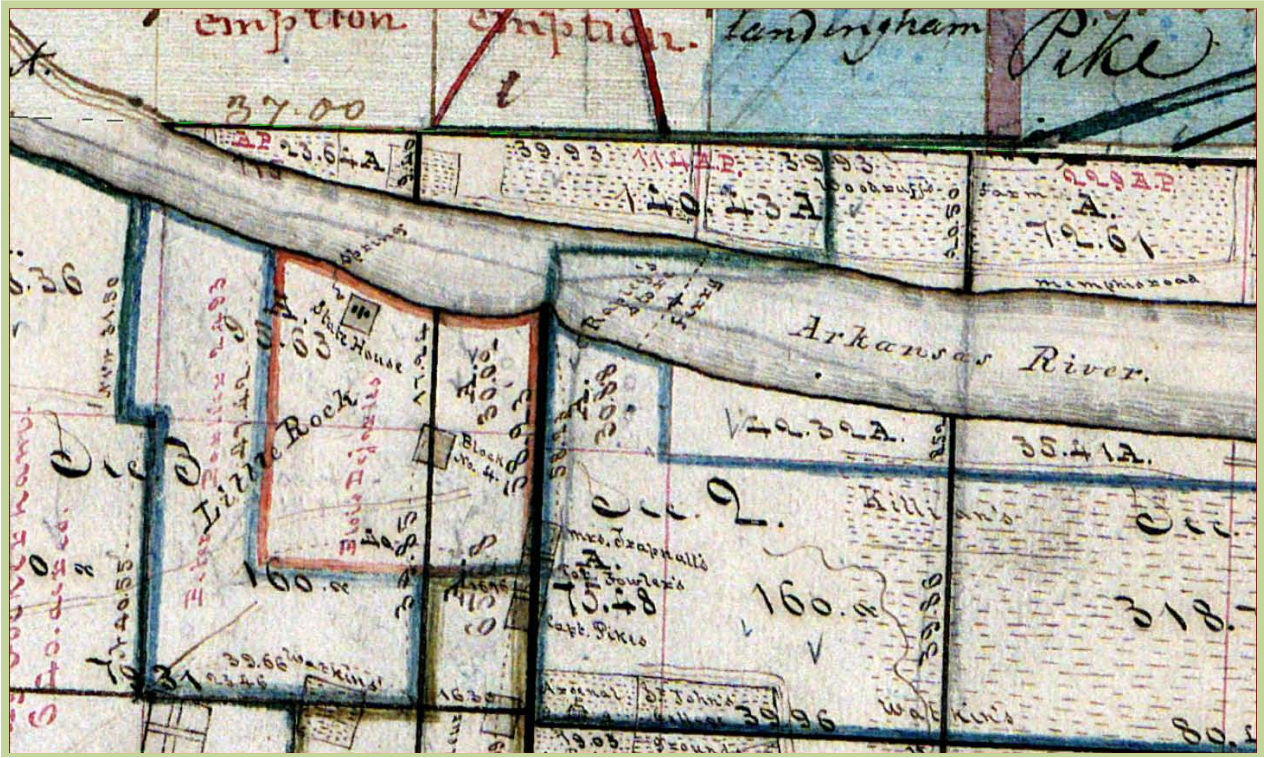
RUSSELL v WHEELER

A DDSM WORKBOOK

Dan B. Robison, PS



A PORTION OF THE PLAT

SETTING THE STAGE

The chief avenue to wealth and power on the cash-poor, agricultural frontier was land. The process of gaining ownership of land, however, was not necessarily easy. From 1686 to 1804, civil law had prevailed in Arkansas by virtue of her possession by Spain and France. Legal historian Lawrence Friedman states that ***"[t]he civil law left some legacies behind. One was a muddled collection of land grants ...."***

This was certainly the case in Arkansas. Some early settlers claimed Spanish land rights; others, French. Indian holdings also complicated the picture. In 1804, Arkansas's indigenous tribes were the Osages, Caddos and Quapaws, but additional treaty rights to Arkansas land were given by the U.S. government to such tribes as the Choctaws, Chickasaws, and Cherokees, before they were ultimately displaced and moved to the Indian Territory.

Finally, Congressional actions affecting land rights were no less confusing. In 1812, Congress set aside 2 million acres of Arkansas as a ***"Military Tract"*** to veterans of the War of 1812. In 1815, in response to the severe New Madrid earthquakes of 1811 and 1812, Congress offered certificates in compensation to earthquake victims which could be exchanged for public land.

Finally, settlers who lived on and improved specially designated lands could purchase them later under ***"preemption"*** laws. Competing with these groups of claimants were the land speculators.

WILLIAM RUSSELL

William Russell, a founder of Little Rock, was one of the surveyors who plied his trade in what later became Illinois, Missouri, and Arkansas.

Of him, an early settler wrote to a Land Office official, ***"It is easy for A crafty Surveyor to become A crafty Land Speculator. Thousands of acres passed through Russell's hands. Many attorneys were land agents and speculated in land. One such was Chester Ashley, one of the first attorneys to settle in Arkansas and a later U.S. Senator. These conflicting land rights caused a multitude of lawsuits in the territory and early state, some of which eventually reached the United States Supreme Court."*** Attorneys profited from these lawsuits as well. As will be shown, Benjamin Johnson played a major role in land disputes, deciding many of the most important claims.

Three opinions from the first of Johnson's sessions on the bench appear in Hempstead's Reports. Of these, ***Russell v. Wheeler***, written by Johnson, was an important link in the chain of events that would confirm the location and owners of the village of Little Rock. ***Russell v. Wheeler*** pitted claimants possessing New Madrid certificates against preemption claimants, and involved some of the most prominent early Arkansans on both sides. One William O'Hara, a land speculator, obtained New Madrid certificates, used them to claim land that is now Little Rock, and assigned part interest in them to James Bryan and Stephen Austin. Unfortunately, the land they claimed partly overlapped land originally preempted in 1814 by an early frontiersman, and eventually sold to William Russell and others. Speculative interest in Little Rock land grew as the Arkansas Territory was formed and discussions began over moving the capital away from the Arkansas Post to a more central location. During 1820, prominent persons purchased Little Rock land from either the O'Hara side or the Russell side. In October,

the territorial legislature did indeed designate Little Rock the temporary seat of government beginning June 1, 1821. The New Madrid claimants had by now built on the disputed land.

Amos Wheeler, acting on behalf of O'Hara and other New Madrid claimants, offered several sections to the territory for government use. **Russell tried to enter the land, was rebuffed, and sued Wheeler for forcible entry and detainer.** He won a favorable verdict from a jury injustice of the peace court. The Circuit Court of Pulaski County overturned the verdict, and Russell appealed to the superior court. Johnson, writing the superior court opinion in June of 1821, reversed the verdict (holding in favor of Russell). In disputing the defendant's contention that the verdict below was *"fatally defective"* because it did not contain the correct wording, the court stated that if the meaning of the jury was clear, *"yet the court are bound to work and mould the verdict into form according to the real justice of the case."* The court thus held in favor of the preemption holders. Immediately thereafter ensued, as one observer put it:

> …a scene of true western life and character that no other country could present. First we saw a large wood and stone building in flames, and then about one hundred men, painted, masked, and disguised in almost every conceivable manner, engaged in removing the town. These men, with ropes and chains, would march off a frame house on wheels and logs, place it about three or four hundred yards from its former site, and then return and move off another in the same manner. They all seemed tolerably drunk, and among them I recognized almost every European language spoken. They were a jolly set indeed. Thus they worked amid songs and shouts, until by night-fall they had completely changed the site of their town. Such buildings as they could not move they burned down, without a dissentant [sic] voice. The occasion of this strange proceeding was as follows: **The Territorial Court was then in session at Diamond Hill [today Crystal Hill], about thirty miles distant on the river above, and the news had reached Little Rock on the morning of our arrival that a suit pending in this Court and involving the title to the town, wherein one Russell of St. Louis was the claimant, had gone against the citizens of Little Rock and in favor of Russell.** The whole community instantly turned out en masse and in one day and night Mr. Russell's land was disencumbered of the town of Little Rock. They coolly and quietly, though not without much unnecessary noise, took the town up and set it down on a neighboring claim of the Quapaw tribe, and fire removed what was irremovable in a more convenient way. The free and enlightened citizens of Little Rock made a change of landlords more rapidly than Bonaparte took Moscow.

A few months later, the two sides compromised, dividing the land between them.

CUTTING UP THE COURTHOUSE

After the seat of territorial government moved to Little Rock, the court met in various buildings before the Old State House was occupied in 1836. During the court's first few sessions in Little Rock, it used the Baptist Meeting-House. In October of 1825, the court met in Colonel Conway's frame house. For awhile, the court met in a house owned by Chester Ashley. William Pope, who sometimes acted as court clerk, related an incident from Judge Johnson's court occurring at that time:

> On one occasion while the court was in session Judge Benjamin Johnson, one of the judges of the court, and who was at times very irritable, discovered Colonel Ashley in the act of whittling, with his pen knife, one of the wooden benches in the court room. Doubtless wishing for some object upon which to vent his ill-humor that day, he called out with some show of impatience, ***"Colonel Ashley, I wish you would quit cutting this court house to pieces!"*** To which Colonel Ashley replied good naturedly, ***"if it pleases your honor, I do not know who has a better right to do so; it is my property."***

DUELING JUDGES

Early Arkansas was notable for the number of duels among its most prominent men, but nonetheless many were shocked when in May of 1824 Benjamin Johnson's superior court brethren, Andrew Scott and Joseph Selden, engaged in a fatal duel. This account was told to William Pope by the son of Judge Scott:

> Soon after Judge Selden went upon the bench he and Judge Andrew Scott, also of the Superior Court, and two ladies, became engaged in a social game of whist at the residence of one of the ladies at the Post of Arkansas. In the course of the game one of the ladies, Judge Scott's partner in the game, remarked: *"Judge Selden, we have the tricks and the honors on you."* To which Judge Selden very abruptly replied: *"That is not so, madam."* The young lady, very much mortified at the ungracious reply, put up her handkerchief to hide her mortification, saying, *"I did not expect to be insulted."* Judge Scott remarked to Judge Selden: *"Sir, you have insulted a lady, and my partner, and you must apologize for your rudeness."* Judge Selden declined to apologize, saying: *"I make no apology. She has stated what is not true."* Judge Scott seized a candlestick, which was standing on the card table, and hurled it at Judge Selden. Parties who were present interfered, and prevented further difficulty at that time.

However, the incident was not over. Scott challenged Selden to a duel. Several weeks elapsed, during which the court met, and according to the Gazette, the *"variance"* of the two judges

toward each other interfered with court business. (Judge Johnson was not present at this term, being temporarily in Kentucky with his family.) Dueling was illegal in the territory at this time, and therefore, the judges met on the eastern side of the Mississippi. Scott shot and instantly killed Selden. Apparently Scott was not prosecuted, even though he and the seconds clearly broke the law, which the editor of the Gazette was outraged enough to reprint in the next issue. Henry W. Conway, who was by now Arkansas Territory's delegate to Congress, merely wrote the Secretary of State that ***"I have learnt today that Joseph Selden Esqr, one of the Judges of the Superior Court of the Territory of Arkansas, died on the 26th of last month,"*** with no further explanation. (Ironically, Conway himself would be killed in a duel by Territorial Secretary Crittenden in 1827.)

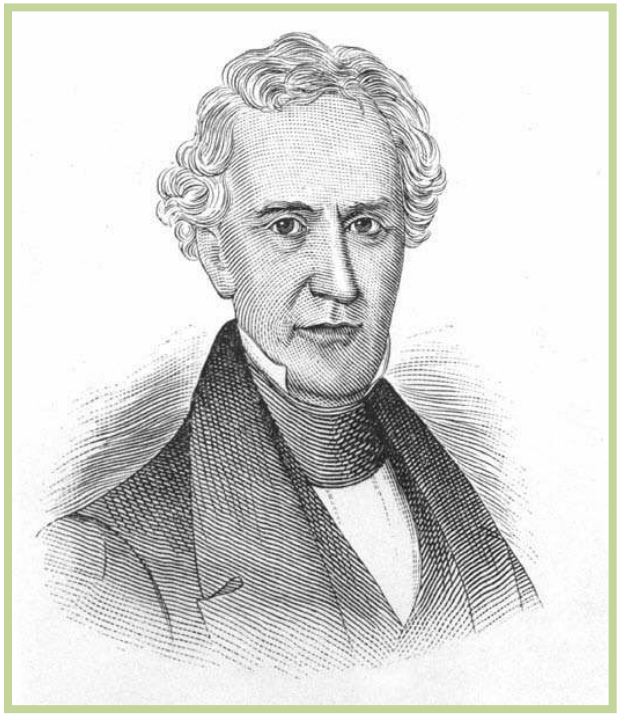
RIDING THE CIRCUIT

In 1827, the legislature finally prevailed in its efforts to require the Superior Court judges to ride circuits. The aversion of the judges to riding the circuit can be partially explained by the following anecdote, told by an attorney to G.W. Featherstonhaugh, an English visitor to territorial Arkansas, who included the description in his travel memoirs:

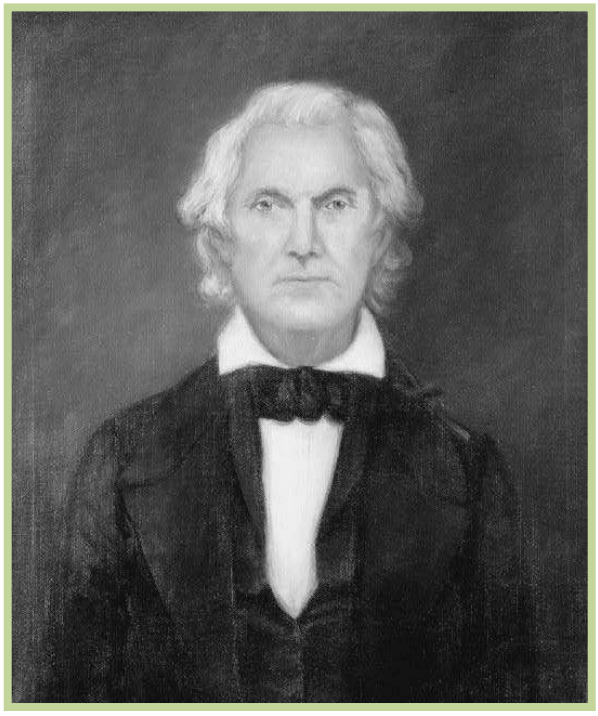
> He stated that some years ago, after a hard day's ride, there was only one cabin at which they could stop, and that it was very important to reach it during the winter season. This cabin belonged to an old hunter, a pioneer in that part of the country, to whom the lawyers-in virtue of the extensive jurisdiction he had over the wilderness-had given the title of Governor Shannon; it consisted of one solitary room with a mud floor, and not a single article of furniture except an old log that he had hollowed out, and that he slept in at night, and sat upon at other times. Upon this mud floor travellers used to stretch themselves in their blanket-coats, and there they pigged with the Governor, an old negress, and a team of dogs he kept to hunt the bars [bears], which were numerous around him. As there had never been a door-or any contrivance approaching it-to the cabin, the dogs used to come in and go out whenever they pleased: if they were all asleep, the barking of a wolf would rouse them, and out they would rush over the recumbent travellers, without being at all particular where they trod upon them. On their return, wet and covered with dirt, they made no ceremony of who they laid near, nor whom they laid upon, for dogs like to lie warm, and this was the reason why the Governor had made his bed in a log. It happened upon one occasion that a judge, who had never made this circuit before, favoured the Governor with his company, and becoming at length outrageously annoyed at the stench and filth of the dogs, one of which had acted very irreverently to his Honour, called out to the Governor, that if he did not take the dog away he

would kill him on the spot. Upon which his Excellency replied, that he "would be ___ ____ if the bl___d judges and lawyers of Arkansas hadn't slept with his dogs for seven years, and that if any man touched one of 'em, he would send him to sleep with the painters [panthers] in less than no time." The Governor was well known to be a resolute fellow, and as there was no other settler nearer than 30 miles, and "a pretty considerable sprinkling of bars and painters about," the judge thought it best to put up with this slight upon his authority.'

Riding the circuit was not only uncomfortable and dirty. It could also be dangerous, as when Archibald Yell, later to be governor, almost drowned crossing the frozen Arkansas River while riding the circuit with some other attorneys from Fayetteville. Perhaps as a trade-off for the imposition of circuit riding, the legislature limited the superior court to appellate jurisdiction in civil and equity cases. Its original jurisdiction in civil cases was abolished.



JUDGE BENJAMIN JOHNSON



JUDGE ANDREW SCOTT

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

UNITED STATES SUPERIOR COURT

FOR THE TERRITORY OF ARKANSAS,

FROM 1820 TO 1836;

AND IN

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARKANSAS,

FROM 1836 TO 1849;

AND IN

THE UNITED STATES CIRCUIT COURT

FOR THE DISTRICT OF ARKANSAS,

IN THE NINTH CIRCUIT, FROM 1839 TO 1856.

WITH NOTES AND REFERENCES AND RULES OF COURT.

BY

SAMUEL H. HEMPSTEAD, ESQ.,

COUNSELLOR AT LAW, LITTLE ROCK, ARKANSAS.

BOSTON:

LITTLE, BROWN AND COMPANY.

1856.

WILLIAM RUSSELL vs. AMOS WHEELER ET AL.

SUPERIOR COURT

1. In forcible entry and detainer, the right of having the proceedings reviewed by a higher tribunal in the mode pointed out by law, is allowed to the defendant as well as the complainant.
2. In forcible entry and detainer, if the summons contains the substance of the complaint so as to apprise the defendant of the nature and extent of the claim, it is sufficient without reciting the complaint fully.
3. Where a limited jurisdiction is conferred by statute the construction ought to be strict as to the extent of jurisdiction; but liberal as to the mode of proceeding.
4. Although a verdict is informal, yet if the substance of the issue has been found, it is good, for a verdict is not to be taken strictly like pleading, and courts will mould a verdict into form according to the real justice of the case.

JUNE. 1821.

FORCIBLE ENTRY AND DETAINER.
ERROR TO THE PULASKI CIRCUIT COURT.
determined before BENJAMIN JOHNSON
and ANDREW SCOTT. Judges.

JOHNSON. J., delivered the opinion of the Court. — Russell sued out from two justices of the peace, a warrant of forcible entry and detainer against Wheeler and others, and the jury having found a verdict against them, they obtained a *certiorari* and brought the case before the circuit court. On the trial in the circuit court, the proceedings of the justices' court were set aside and annulled. Many objections have been urged to the writ of *certiorari* granted by the court below, which, from the view we have taken, we do not deem it material to decide.

For the sake of the practice, however, we will consider the first.

It is contended that a writ of *certiorari* in a case of forcible entry and detainer, is, by the statute, allowed to the plaintiff only. If this construction be correct, it is believed that it would present a novelty in the history of judicial proceedings. What just reason can exist for permitting a plaintiff in a case of this kind to apply to a superior tribunal, to correct errors and annul proceedings by which he is prejudiced, and denying the same right to a defendant, we are wholly at a loss to discover. That a claim may be set up by a plaintiff which is neither supported by justice nor law, as well as that a defendant may have acted illegally, are abundantly manifest. We cannot suppose that because a complaint is made, and a suit instituted, that it therefore follows that the party has a just cause of action.

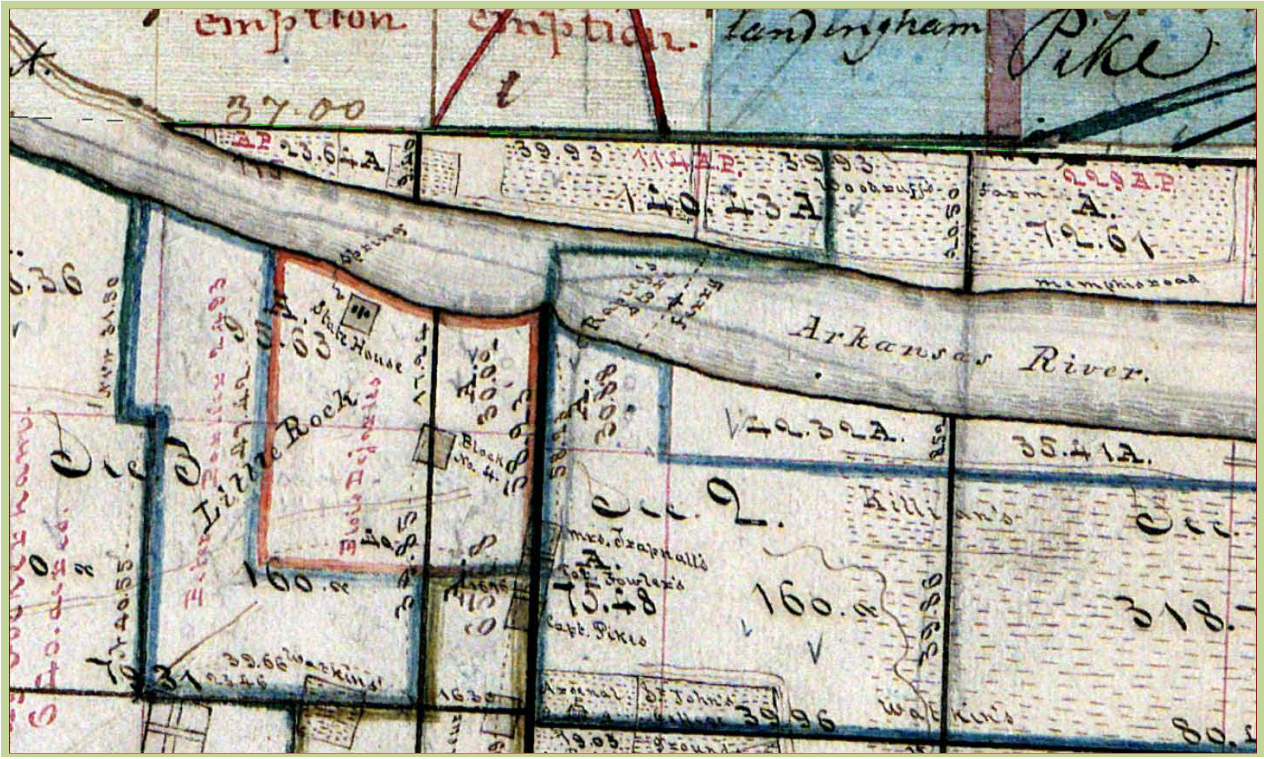
Experience evinces that many claims are asserted which have no foundation in justice or in law.

It would seem, therefore, as reasonable to extend to the defendant the same means for the correction of errors which may have been committed against him, as to the plaintiff when similarly situated. But from an examination of the statute, it is clear that it does not warrant the construction contended for.

The right of having the proceedings reviewed by a higher tribunal is reciprocal, and is alike demandable by either party. Geyer's Digest, 204.

We will now proceed to what we deem the main question in the cause, namely: Whether the court below acted correctly in setting aside and reversing the judgment of the justices. The first error in the proceedings before the justices court relied on by the counsel of the defendants in error is, **"that; the summons is not issued according to the form prescribed by the statute; it omits one half of the plaint; it omits the time the forcible entry and detainer was alleged to have been done; it omits the quantity of land, and the description of the boundaries as given in the plaint, and misrecites that part of the plaint which it purports to recite."**

It is true that the summons does not contain a literal copy of the complaint, nor do we apprehend that it is necessary. All that is essential is, that the summons shall contain the substance of the complaint, and so describe the land in contest that the defendant may be apprised of the extent of the claim set up against him, and thereby be enabled on the trial to make his defence.



A PORTION OF THE PLAT

That the summons contains a proper and definite description of the land, so as fully to apprise the defendant of the subject matter in dispute, we think admits of no doubt. The complaint is upon a forcible entry and detainer upon the **fractional quarter of section two, in township one, north of the base line of range twelve, west of the fifth principal meridian, containing about forty acres of land, bounded on the north by the Arkansas river, on the east by the Quapaw Indian line, on the west by the north and south line, between sections two and three in township aforesaid, on the south by the southwardly boundary of the north-west fractional quarter of section two.**

The summons describes the premises to be, **"That part of the north-West fractional quarter of section two, in township one north of the base line, range twelve west of the fifth principal meridian that lies south of the Arkansas river, at a place called 'Little Rock Bluff,' in the county of Pulaski."**

It is easy to perceive that the summons describes the same fractional quarter section of land that is described in the complaint, and although the description is not made in the same words, yet they are substantially the same. It has been contended that the form of proceeding given by the act of assembly must be literally pursued. By adverting to the adjudications of other courts it will be seen, that a more liberal interpretation has been given to statutes analogous to the present. In the case of *Barret v. Chitwood*, 2 Bibb, 431, upon a statute in many respects similar to the one under which these proceedings were had, the court says: **"Where a limited jurisdiction of this sort is given by act of assembly to be exercised *in pais*, the correct rule appears to be, that as to the extent of jurisdiction the act should be construed strictly, but with respect to the mode of proceeding, a liberality of construction ought to be indulged."**

Other cases might be cited to show that where a statute prescribes a form of proceeding, a substantial, and not a literal compliance is all that is required. We are therefore of opinion that the summons in this case contains the essential part of the complaint, and that it is sufficient under the act of assembly. The point mainly relied on by the defendants' counsel is, **"that the verdict of the jury was fatally defective, and insufficient for the justices to enter ajudgment thereon."** It is in the following words:

> **"The jury upon their oaths do find, that the lands or tenements in the county of Pulaski, bounded and described as in the complaint, upon the first day of January, 1820, were in the lawful and rightful possession of said William Russell, and that the said Amos Wheeler and others did, upon the same day, unlawfully with force and strong hand expel and drive out the said William Russell; wherefore the jury find upon their oaths, that the said William Russell ought to have restitution thereof without delay."**

Several specific objections have been urged against the verdict, which we will proceed to examine :

1. It is insisted that the verdict does not pursue the form prescribed by the statute. This objection, as far as it regards form only, has been sufficiently remarked upon, and no further observations will be added.
2. **"That it does not contain a description of the land in contest."** By a reference to the verdict it will be seen, that although it does not itself describe the boundaries, yet it refers to a paper in the case, the complaint, for the boundaries, which renders it as certain and as definite as if those boundaries were again recapitulated in the verdict itself. The maxim of law, *"Id certum est quod cerium reddi potest,"* applies to cases like the present; we are therefore of opinion, that it is not defective on this account, but that it sufficiently describes the land in controversy.
3. **"That it only finds a forcible entry into the premises, and does not find a forcible detainer by the defendants."** Upon an examination of the verdict we are clearly of opinion, that it finds a forcible detainer as well as entry. What is the language of the verdict? It is, **"That the jury find that the defendants did with force and strong hand expel and drive out the plaintiff; wherefore the jury find upon their oaths, that the said William Russell ought to have restitution thereof without delay."**

What is the conclusion that a mind unshackled by technical rules would draw from the latter clause of the verdict? Is not the inference irresistible, that the jury find a detainer when they say that the plaintiff ought to have restitution without delay?

Why should he have restitution, unless he was kept out of possession? Upon any other supposition the language is more than unmeaning; **it is absurd.**

If then the meaning of the jury is clear, and it is their intention to say, as it certainly is, that the defendants detain the premises, although it may not be expressed in technical language, or according to usual forms, yet the court are bound to work and mould the verdict into form according to the real justice of the case.

The rule upon this subject has been long settled, and is supported by a uniform train of authorities. In the case of *Worley v. Isbel*, 1 Bibb, 251, it is laid down,

> **"that though the verdict may not conclude formally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve. Verdicts are not to be taken strictly like pleadings, but the court will collect the meaning of the jury, if they give such a verdict as the court can understand."**

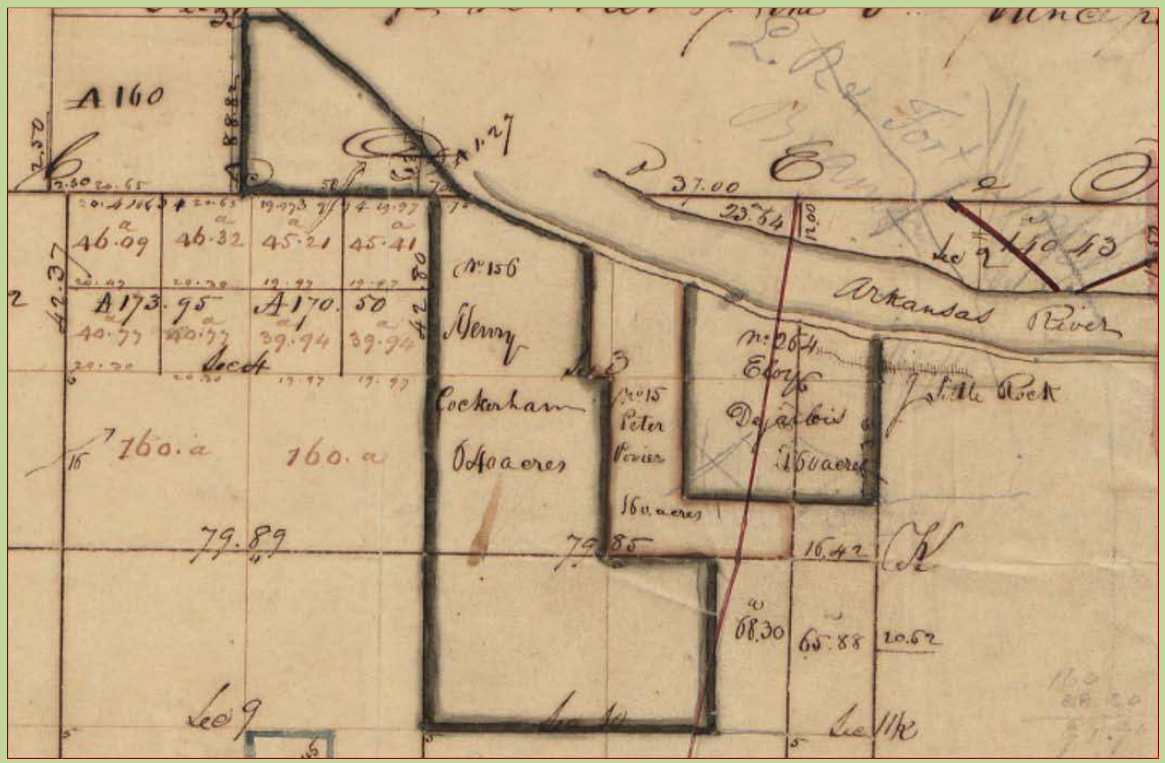
The same principle will be found decided in the case of *Patterson v. The United States*, 2 Wheaton, 221.

The same doctrine is to be found, only in a stronger point of view, in *Crozier v. Gano and wife*, 1 Bibb, 257. And to the same effect are cases in 2 Bibb, 427; 3 Henning & Munford, 309; *Hawks v. Grafton*, 2 Burr. 698.

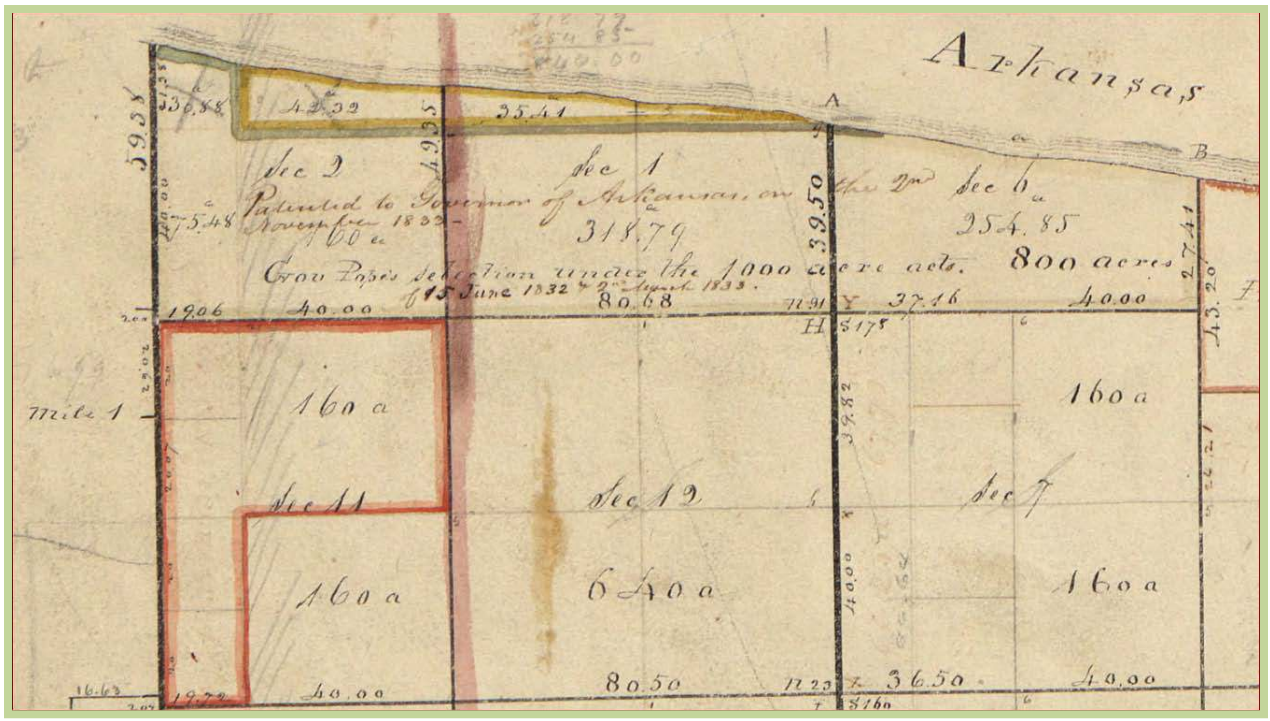
In the case before the court, there can be no doubt as to the meaning of the jury.

They have in substance found that the defendants detained the land in contest; we are therefore satisfied that this objection to the verdict ought not to be sustained.

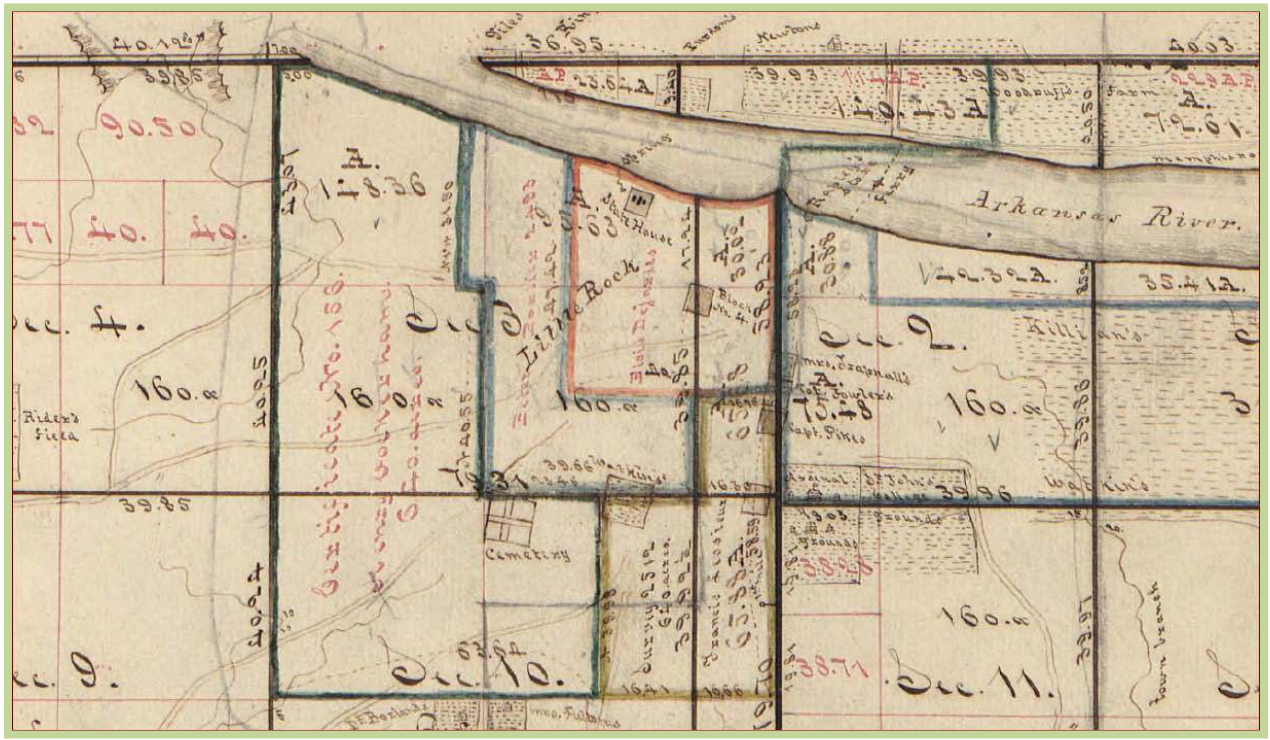
Upon a consideration of the whole case we are of opinion, that the **circuit court erred** in setting aside and reversing the proceedings of the justices, and the judgment, therefore, must be reversed and the cause remanded.



1819 GLO PLAT
WEST OF THE QUAPAW LINE



1834 GLO PLAT
EAST OF THE QUAPAW LINE



1855 GLO DEPENDANT RETRACEMENT PLAT
TOWN OF LITTLE ROCK

Pre-emption Certificate No. 114.

The United States of America.

233

To all to whom these presents shall come, Greeting:

Whereas William Russell has deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Batesville, whereby it appears that full payment has been made by the said William Russell according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the Public Lands," for the North fraction part of the North half of Section Two (North of Arkansas River) in Township One, North, of Range Twelve, West, in the District of Lands subject to sale at Batesville, Arkansas, containing One hundredth one forty acres and forty three hundredths of an acre, according to the official plat of the survey of the said Lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said William Russell

NOW KNOW YE, That the **UNITED STATES OF AMERICA,** in consideration of the premises, and in conformity with the several acts of Congress, in such case made and provided, have given and granted, and by these presents do give and grant, unto the said William Russell and to his heirs, the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging, unto the said William Russell, and to his heirs and assigns forever.

In testimony whereof, I, Andrew Jackson PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these Letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twenty third day of June in the year of our Lord one thousand eight hundred and thirty six and of the Independence of the United States the Fifty first.

Andrew Jackson

By the President:

A. J. Donelson, Sec'y

By

Ethan A. Brown Commissioner of the General Land Office.

234

Pre-emption Certificate No. 115.

The United States of America.

To all to whom these Presents shall come, Greeting:

Whereas William Russell has deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Batesville, whereby it appears that full payment has been made by the said William Russell according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the Public Lands," for the North East fraction of Quarter (North of Arkansas River) of Section Three in Township One North of Range Twelve West, in the District of Lands subject to sale at Batesville, Arkansas, containing Twenty three acres and fifty four hundredths of an acre, according to the official plat of the survey of the said Lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said William Russell

NOW KNOW YE, That the **UNITED STATES OF AMERICA,** in consideration of the premises, and in conformity with the several acts of Congress, in such case made and provided, have given and granted, and by these presents do give and grant, unto the said William Russell, and to his heirs, the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging, unto the said William Russell, and to his heirs and assigns forever.

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L. S.

Given under my hand, at the City of Washington, the twenty third day of June in the year of our Lord one thousand eight hundred and thirty six and of the Independence of the United States the Fifty first.

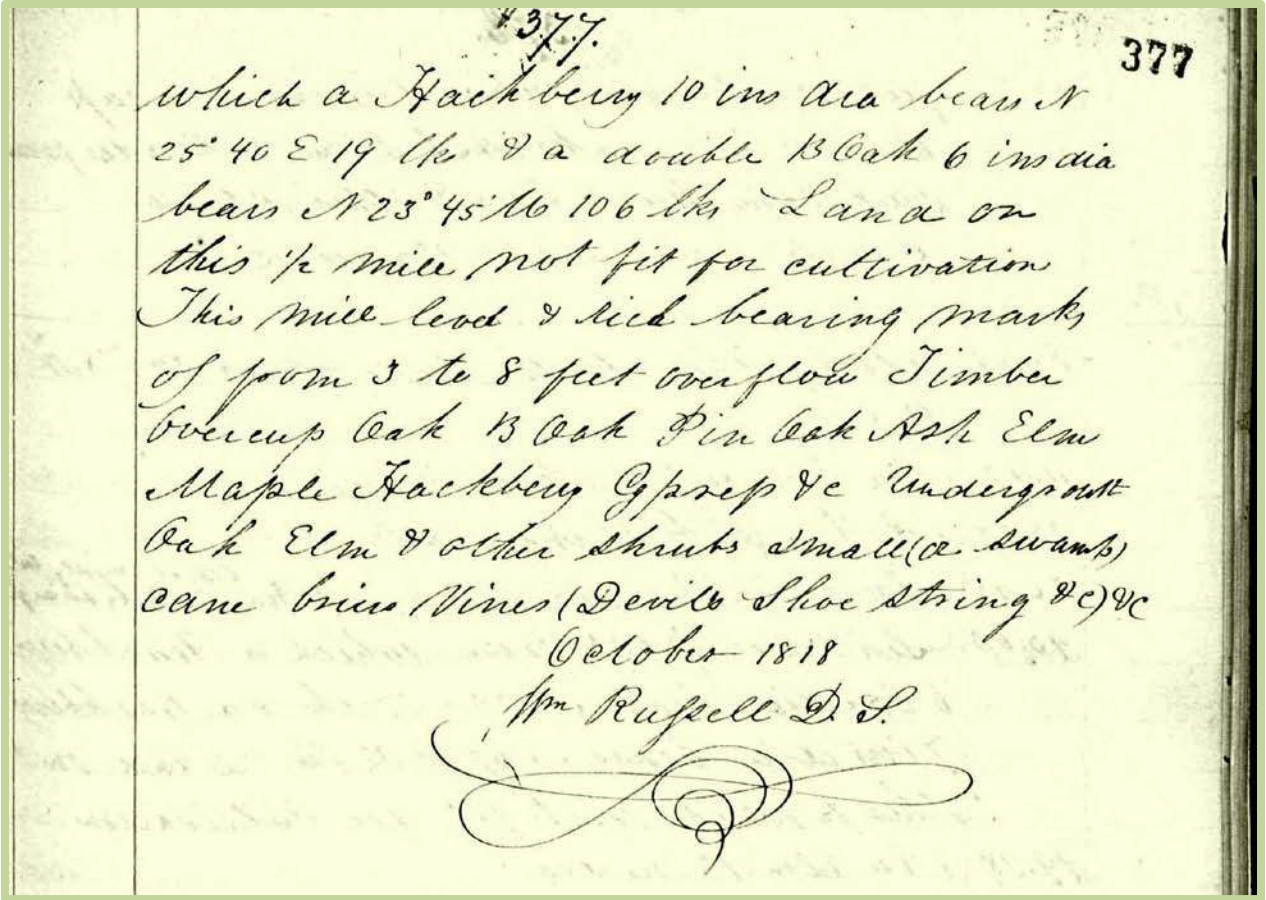
Andrew Jackson

By the President:

A. J. Donelson, Sec'y

By

Ethan A. Brown, Commissioner of the General Land Office.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which a Hackberry 10 ins dia bears N
25° 40 E 19 lks & a double B Oak 6 ins dia
bears N 23° 45' W 106 lks Land on
this ¼ mile not fit for cultivation
This mile level & thick bearing marks
of from 3 to 8 feet overflow Timber
Overcup Oak B Oak Pin Oak Ash Elm
Maple Hackberry Cypress &c Undergrowth
Oak Elm & other Shrubs small (& Swamps)
cane brier Vines (Devils Shoe String &c) &c
October 1818
Wm Rufsell D S.

"It is easy for A crafty Surveyor to become A crafty Land Speculator."

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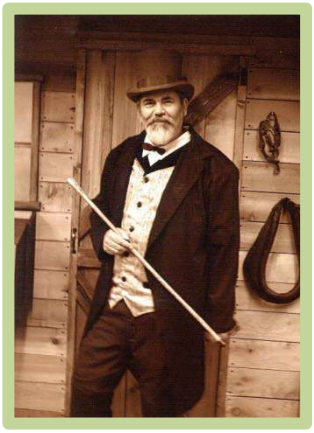

Dan B. Robison, Professional Surveyor and Director of Surveys at FTN Associates, Ltd. has been involved in land surveying, engineering and related fields since 1976, specializing in boundary retracement and boundary dispute resolutions and litigations. He is licensed in the State of Arkansas. In addition to his duties at FTN, Mr. Robison serves as an active mentor to the new generation of Arkansas Surveyors. He is a founding member of the Pantopragmatic Arkansas Land Surveyors (PALS). He is also a member of the Arkansas Society of Professional Surveyors (ASPS) having served on various committees. Mr. Robison takes an active role in education and legislative concerns of the profession.

Mr. Robison provides Expert Witness services and assistance to Attorneys, Title Companies, Developers and Land Owners. He can assist with the necessary title research, historical research and analysis of your land boundary or title problem. His insight and expert application of legal principles affecting the location of your boundary line or the rights, title or interests of your property will provide an element of certainty necessary for knowledgeable, informed decisions. Mr. Robison can provide input and assistance in the litigation process in the preparation of complaints, responses, interrogatories, and requests for production. Mr. Robison can prepare the surveys, reports, affidavits and exhibits necessary for presentation in the courtroom.

Dan B. Robison, PS