GABE, *alias* SANTA ANNA *vs.* THE STATE.

Passing counterfeit coin is not a trespass on the person or property of another, within the meaning of *section* 82 *of chapter* 45, *Rev. Stat.*

Base and *adulterated,* in common parlance, signify the same thing, and there is no repugnancy in charging, in an indictment under the act of 1838, *Pamph. Acts, page* 124, that the defendant passed *one* piece of base *and* adulterated coin.

In an indictment for passing counterfeit coin, the allegation that it was passed to a particular person, is material, and the christian name of the individual must be proven as charged.

Where one was indicted for passing counterfeit coin to Eli Clemens, and there was no proof that his name was *Eli,* it was erroneous for the court to instruct the jury that they might infer from the testimony that his name was *Eli.*

Though there being no proof that his name was *Eli,* such instruction is regarded as abstract.

Writ of error to the circuit court of Pulaski county.

THIS was an indictment against the plaintiff in error for passing counterfeit coin; determined in the Pulaski circuit court, at the October term, 1845, before CLENDENIN, judge.

The indictment follows:

"The grand jurors for the State of Arkansas, duly returned, &c. &c., present that William Gabe *alias* Santa Anna, late of &c., on the ninth day of September in the year of our Lord one thousand eight hundred and forty-five, in the county of Pulaski aforesaid, *one* piece of *base* and *adulterated* coin, in imitation of and resembling a piece of the gold coin which then and there was, and now is, current by law in this State, called a gold eagle, and otherwise commonly known as a ten dollar gold piece, feloniously and fraudulently did pass to one Eli Clemens, he the said William Gabe *alias* Santa Anna, at the time he so passed the said piece of base and adulterated coin, then and there well knowing the same to be base and adulterated, false and counterfeit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Arkansas."

The defendant's counsel moved to quash the indictment on the following grounds:

'1st, The indictment charges the defendant with a trespass, less than felony, against the person or property of an other; and the name of the prosecutor is not endorsed thereon, nor is the same preferred on the information or knowledge of one or more of the grand jury, nor on the information of some public officer in the necessary discharge of his duty, nor on the testimony of some witness other than the party injured—there being no statement that such was the fact made at the end of the indictment, and signed by the attorney for the State, as required by *section* 82, *chapter* 45, *Rev. Stat. p.* 298: 2d, The indictment is uncertain, repugnant, and double, in this, that it charges the defendant with passing *a base and adulterated counterfeit coin,* and does not show whether it was *base or adulterated* coin as contemplated by the statute: and 4th, The defendant is indicted by an *alias christian* name.''

The court overruled the motion to quash, and the defendant refusing to plead, ordered the plea of not guilty entered for him, under the statute. The case was submitted to a jury, and defendant convicted.

Pending the trial, defendant took a bill of exceptions, in substance as follows:

''Be it remembered that this cause came on for trial on the 1st day of November, 1845, and it was proven by several witnesses that defendant passed a counterfeit gold eagle, or ten dollar piece, to *Clemens.* Some of the witnesses called him Clemens, others Mr. Clemens, but none of them called him *Eli* Clemens—none of them mentioned his name as *Eli* directly or indirectly. The attorney general did not ask any of the witnesses if they spoke of *Eli* Clemens, nor did he prove that the counterfeit coin was passed to *Eli* Clemens, nor did he ask any of the witnesses if the Clemens of whom they spoke was the same mentioned in the indictment. There was no proof whatever that the Clemens spoken of as having had the counterfeit coin passed on him was named *Eli.* And be it further remembered that, after the argument of counsel was over, the attorney for defendant asked the court to instruct the

jury, that unless the State had proven that the defendant passed the counterfeit coin to *Eli* Clemens as charged in the indictment, they must find for the defendant: which instruction the court gave. Whereupon one of the jurors remarked to the court, that it was not worth while for them to retire, that he was not satisfied that Clemens' name was proven to be *Eli*. The attorney general then asked the court to instruct the jury that they might infer from the testimony that the Clemens spoken of by the witnesses was named *Eli* without its being actually proven: which instruction the court gave, to which the defendant excepted, and asked and obtained leave to file a bill of exceptions on a future day of the court, which bill of exceptions is now on this day signed, sealed and ordered to be made part of the record in this case."

E. H. ENGLISH, for the plaintiff.

Should not the motion to quash have been sustained? If passing counterfeit coin be a trespass upon the person or property of an other, less than felony, the name of the prosecutor should have been endorsed upon the indictment, or the Attorney General should have made the statement at the conclusion thereof, required by *sec.* 82, *of chap.* 45, *Rev. Stat.* We have no statute classifying crimes, and declaring what shall be deemed felonies, what less. By the common law, passing counterfeit coin is a misdemeanor. 1 *Russel on Crimes* 78, *note a.* Is it a trespass within the meaning of the Statute? By the word *trespass* is meant *injury* or *wrong.* Every injury done an other is a trespass, and force is express or implied. Actual force is not necessary to make an act a trespass. To pass bad coin to one, is doing him an injury, and may we not say it is a trespass *upon him?*

Again, the language of the act, under which the indictment was drawn, is: "No person shall fraudulently make &c. any base *or* adulterated coin, in imitation &c. nor fraudulently pass &c. any such base *or* adulterated coin." Acts of 1838, p. 124. *Base* and *adulterated* are in the disjunctive. Did the law makers use them as convertible terms, or to designate different kinds of counterfeit coin?

The Legislature must have known that counterfeiters are in the habit of making two kinds of bad coin: 1st *base coin*, that is, coin made of base metal altogether, colored by chemical means: 2d *adulterated coin*, that is, coin made of gold or silver intermixed, or *adulterated*, with base metal. The two are distinct species. *One* eagle cannot therefore be base *and* adulterated, it may be base *or* adulterated in the language of the statute, and the indictment should have charged it to belong to one or the other, not both species. As well charge a man with passing *one* counterfeit paper *and* silver dollar, or any other absurdity. Repugnancy or absurdity in an indictment is fatal, *Chit. Cr. Law. Tit Ind.*

The court improperly charged the jury as moved by the Attorney General. That the defendant passed the coin to *Eli* Clements, was a material averment, and should have been proven. 2 *Stark. Ev.* 442, 444-5, notes, and 513-4. 1 *Chit. Cr. Law*, 213-4, 216-7, and 557. To charge the jury that they might *infer* from the testimony that his name was *Eli*, when the bill of exceptions positively shows that it was not proven directly, or indirectly, was erroneous—it was equivalent to saying to them that they might *guess* his name to be *Eli*. The instruction cannot be regarded as abstract, for the bill of exceptions shows that it influenced the verdict.

WATKINS, Atto'y Gen'l, contra.

JOHNSON, C. J., delivered the opinion of the court.

The plaintiff in error insists that the circuit court erred, first, in overruling his motion to quash; and secondly, in his instructions to the jury. He contends that he is charged with the commission of a trespass, and that the offence being less than felony, the indictment should have disclosed the name of the prosecutor, or that some other endorsement should have been made, which would dispense with the necessity of such disclosure. We think it scarcely necessary to have recourse either to argument or authority to prove that the offence charged is not a trespass within the meaning of the Statute. It will be conceded that the term trespass, in its most extensive signification, includes every description of wrong; on which account an action on the case has been usually called

trespass on the case, but technically, it signifies an injury committed *vi at armis*. The action of trespass only lies for injuries committed with force, and generally, only for such as are immediate. It is presumed that the Legislature, in the use of the word "trespass" did not design to extend the proceeding by indictment so as to cover more ground than the civil action of trespass in the strictest and most technical sense of that term. It is clear that the fact charged against the plaintiff in error, if supported by the testimony, would not be sufficient to enable the injured party to maintain an action in form *ex delicto*, and that consequently it could not amount to a trespass as contemplated by the statute. The next objection is that he is charged with passing base and adulterated coin, when the language of the act is in the alternative. The indictment cannot be said to be either uncertain or double, on account of the form of the expression adopted, as the words base and adulterated are used in common parlance to signify the same thing, and were doubtless so designed by the Legislature. The distinction attempted to be taken, we think unwarranted by the authorities, and that therefore the objection cannot be allowed to prevail.

We come now to consider the last, and, as we conceive, the most material question raised by the record. The question is, were the jury warranted by the law in rendering a verdict of guilty against the party. In order to solve this question correctly, it will be necessary to inquire whether it was incumbent upon the State to prove the Christian name of the injured party. It is a general rule that every matter which it is necessary to allege as constituting a material ingredient in the offence must be supported by proof. It is of the very essence of the offence that some person has been defrauded by the criminal practices of the party accused. It is therefore necessary that the name of the party injured should have been alleged; and being alleged, it was equally necessary that it should have been proved. The bill of exceptions, if it is entitled to that name, is a sort of anomaly. It does not attempt to set out the testimony as detailed by the witnesses, but, in broad and general terms, states what was and also what was not proved. This paper, if it amounts to any-

thing, is an agreed state of facts, and as such, leaves nothing to be ascertained by the jury. We have viewed it in every possible light of which it is capable, and can arrive at no other conclusion. From every thing that appears of record, we are left to conclude that the Attorney for the State agreed to, or at least acquiesced in, the statements therein contained, and that both parties referred the questions of law arising upon those facts to the Court. The crime is charged to have been committed against Eli Clemens, and the bill affirmatively shows that there was no proof, either directly or indirectly, that his name was *Eli.* It being conceded upon the record that there was a failure of the proof upon that point, it only remains to be determined whether such proof was required by law. We think it clear that the case was not made out in the absence of proof going to establish the identity of the injured party, and that therefore the jury convicted him contrary to, or in other words, without law. The verdict of the jury being without the warrant of the law, the judgment pronounced thereupon is necessarily erroneous. The instructions asked for by the counsel for the prisoner were properly given by the court. Those asked for by the attorney for the State were improperly given as there was no testimony to which they could be made to apply, and consequently they could amount to nothing but mere abstract questions. It is expressly agreed by the parties that no evidence whatever was adduced, going to prove the christian name of Clemens, either directly or indirectly, consequently the instruction asked for by the State and given by the court could have had no relevancy to the case as presented to the jury. This instruction, though improperly given, would not of itself have vitiated the judgment as it could have had no influence upon the minds of the jury, under the state of case as presented by the record. We think it clear that the verdict of the jury, on account of the failure to identify the injured party, is contrary to law. For this error the judgment must be reversed. Judgment reversed and the prisoner remanded.