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

Plaintiff in error was indicted as William Gabe *alias* Santa Anna—he moved to quash upon the ground that he was indicted by a second christian name under an *alias dictus*—held that the objection should have been raised by plea in abatement, as it was not apparent upon the record whether Santa Anna was a christian name, Surname, or both.

In an indictment against one for fraudulently keeping in his possession a fictitious instrument purporting to be a bank note it is not necessary to set forth a copy or *fac simile* of the instrument, but it is sufficient to describe it in such manner as to give it identity.

In such an indictment it is necessary to aver that the defendant had the fictitious note in possession with intent to utter or pass it as and for a genuine bill.

Where an evil intent constitutes a material part of the offence, it ought to be charged.

Writ of error to the circuit court of Pulaski county.

THIS was an indictment against William Gabe *alias* Santa Anna for having in his possession a counterfeit bank note, determined in the circuit court of Pulaski county, at the October term, 1845, before CLENDENIN, Judge.

There were two counts in the indictment, the first charging that defendant did feloniously and fraudulently keep in his possession the counterfeit resemblance and imitation of a bank note of and upon the Merchants and Planters Bank of the State of Illinois, knowing the same to be counterfeit, &c.

The second count was, in substance, as follows:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said William Gabe *alias Santa Anna,* afterwards, to wit, an the day and year last aforesaid [9th Sept. 1845] in the county aforesaid, did feloniously and fraudulently keep in his possession a certain fictitious instrument, purporting to be a bank note of and upon the Merchants and Planters Bank of the State of Illinois, which said fictitious instrument is a follows, that is to say:

"C. No. 565. *The President and Directors of the Merchants and Planters Bank* promise to pay on demand to S. C. Morris or bearer Fifty Dollars.

Chicago, State of Illinois, Dec. 3*d,* 1838.

JOHN B. ROBINSON, *Pres't.*

J. W. HAMILTON, *Cash'r.*"

He the said William Gabe *alias* Santa Anna then and there well knowing the same to be fictitious, and that no such corporation or company existed, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Arkansas."

Defendant's counsel moved to quash the indictment upon the ground that he was indicted by an *alias* christian name: and moved to quash the second count upon the ground that it was argumentative in a material matter, to wit, that it was not stated, except argumentatively, that no such bank as the one mentioned in the count existed; and that there was no averment that it ever existed.

The court overruled the motion, the defendant then refused to plead, and the court ordered the plea of not guilty entered for him, under the statute. The case was submitted to a jury, and they found the defendant guilty as charged in the second count in the indictment.

Pending the trial the defendant took a bill of exceptions, from which it appears that the Attorney General offered in evidence, as the fictitious bill set out in the second count in the indictment, a note which is appended to the bill of exceptions, and made part of it by order of the court, to the reading of which defendant's counsel objected, but the court permitted it to go to the jury, and he excepted. The bill is well executed, and resembles in all respects a bank note. Across its right end is printed in large letters the word "FIFTY," near the middle of its upper edge, in large figures, "50," on the lower left hand corner a large "L," and it is embelished with a Steam Boat in full blast, and an Eagle. In other respects the bill is correctly copied in the indictment, as above.

Defendant's counsel moved in arrest of judgment on the following grounds:

"1st, The indictment, in the second count upon which defendant was found guilty, does not charge that the defendant kept the fictitious bank note or bill in his possession with the intention of passing it as and for a good and current note or bill: 2d, said count charges the defendant with fraudulently keeping said bill in his possession, without setting forth the facts to show what constituted such fraud: 3d, the charge in said count does not contain a certain description of the crime of which the defendant is accused: and 4th, the said count does not aver that there was in fact, or in law, no such bank as the Merchants & Planters Bank of Illinois; and is in other respects informal and defective."

The court overruled the motion, and defendant brought error.

E. H. ENGLISH, for plaintiff, as to the motion to quash, cited *Chit. Cr. Law V.* 1, 203, *Arch. Cr. Plead.* 27: *R. vs. Newman,* 1 *Ld. Ray.* 562: *Scott vs. Soans,* 3 *East* 11. These authorities show that a man cannot be indicted by a second christian name under an *alias dictus.* That it may be reached by motion to quash: See 1 *Chit. Cr. Law,* 445. The second count should have been quashed, because the non-existence of the bank was not positively avered. *Fergus vs. The State,* 6 *Yerg. R.* 345.

The note exhibited in the bill of exceptions should have been excluded from the jury. 1 *Chit. Cr. Law,* 334-5.

The judgment should have been arrested. The intent to pass constitutes the crime, and should be averred. One may have counterfeit or fictitious bank notes in his possession innocently, or for one or more of many fraudulent purposes, as to utter them for good money, to make more like them, to create a falso credit by exhibiting them as genuine &c. The evil intent should be averred. 1 *Chit. Cr. Law,* 233. *Fergus vs. The State,* above cited is a case in point. The indictment there was drown under a statute of which ours is a copy, and it was held bad because the intent to to pass was not alleged.

It is not sufficient to draw the indictment in the language of the statute, unless all the ingredients of the crime are expressed in

the act. The argument of Mr. Hoover in the case of *Fergus vs. The State,* and authorities cited by him, are conclusive on this point.

WATKINS, Att'y Gen'l contra.

The motion to quash, and the objection for variance is waived by the motion in arrest of judgment, according to the view entertained by this court, in the case of *Funk vs. The State, ante* 141-2. And so the objection for misnomer being matter in abatement, was waived. *Ibid.*

By the Rev. St. Tit. "Criminal Jurisprudence" the intent to injure or defraud by uttering or intending to cause the same to be uttered as true or false, is in express terms made an ingredient in the description of the offence. But the *Penitentiary Code, Acts of* 1838 *p.* 123, supervening upon the old statute introduces a new description of this and other offences and upon this the indictment in this case is necessarily based—inasmuch as the intent, &c. is omitted in the new statute, it is unnecessary to allege it.

Fergus vs. The State, 6 *Yerger R.* 345, cannot be the law, unless a court has the right to add to the statute or to say that the legislature did not mean what they have expressly said. It is the province of a court to *construe,* not to *add* to or restrict, the language of a statute.

Under an English statute precisely similar to ours, it is not necessary to charge the intent to defraud. See *precedent Arch. Cr. Pl.* 297, and for Stat.: *vide appendix to same* 287, in which the intent to defraud is not made an ingredient in the offence, but the onus of proving the forged note to have been lawfully in his possession is thrown upon the party accused.

In regard to the statutory offence of having counterfeit coin in possession, where the intent to utter the same is made on ingredient in the offence, and must be charged, See *Roscoe Crim. Ev. p.* 304.

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

The record and assignment of errors present several questions for the consideration and decision of this court. We will consider the objections in the order stated in the assignment of errors. The first objection urged is that the circuit court erred in refusing to quash the indictment upon the ground that a christian name alone appears after the *alias dictus*. We deem it unnecessary to enter upon a discussion of the merits of this objection, as the fact set up, if true, could not have been reached by a mere motion; but would have required a regular plea in abatement. The court could not know judicially whether Santa Anna was a christian or sur-name, or whether it did not include both. This is a matter entirely dehors the record, and if the party desired to take advantage of it he should have brought the matter before the court by an appropriate plea. If it amounts to any thing, it is a misnomer, and misnomers are only pleadable in abatement. The next objection is that the court permitted the fifty dollar bill exhibited in the bill of exceptions to be read to the jury. This directly raises the question, whether it is necessary to set out the instrument *in haec verba*, or whether the substance is not sufficient for the purposes of the law. The object of setting out the instrument, is that the court may see and be able to form an opinion, whether it be that which it is alleged to be, and whether it falls within the statute or law upon which the indictment is founded. It is not necessary to set forth any copy or *fac simile* thereof, but it is sufficient to describe the instrument in such manner as to give it identity. It is clear, from a comparison of the instrument offered in evidence with the one described in the indictment, that they are one and the same, and therefore there is no variance. The third assignment only revives the questions raised by the motion, consequently it is not necessary again to consider them.

The last point made, and the one upon which the case must turn, is that the indictment is fatally defective in failing to give a sufficient description of the offence. The indictment was framed upon the fourth section of an Act passed in 1838, entitled "An act modifying the Penal Code to correspond with the establishment of a Penitentiary." The clause of the section, upon which the indictment

is founded, provides that whoever "shall fraudulently keep in possession or conceal any fictitious instrument purporting to be a bank bill, note, check or draft of any corporation, company or person, whether the same be filled up and complete or not, though no such corporation, company or person exist, "shall be imprisoned in said jail and penitentiary," &c. It is contended that the charge is not sufficiently specific as it does not aver that he had it in possession with intent to utter or pass it. This indictment does not charge the offence contemplated in the fourth section of the act of 1838, with sufficient certainty. The possession of fictitious bank notes with intent to impose them on the community as good money, constitutes the essence of the offence intended to be punished. The indictment ought to have so charged it, for where the evil intent constitutes a material part of the offence, it ought to be charged. 1 *Ch. Crim. L.* 233, 245. 6 *East* 474. 4 *T. Rep.* 129. In the case of *Fergus vs. The State,* 6 *Vol. Y. Rep. p.* 352, it was ruled by the Supreme Court of Tennessee, and that too upon a statute of which ours is an exact copy, that the intent to commit a fraud by passing the counterfeit notes must still be charged, though it may be charged generally without specifying any particular person, corporation or company intended to be defrauded. Such was the opinion of the court, notwithstanding the 73d section of their act, which provided that in all prosecutions for offences under it, where the fraudulent possession or concealment of the thing constitutes the offence, it shall be sufficient to allege in the indictment that the party charged fraudulently possessed or concealed such thing without charging or proving that any particular person, corporation or company was intended to be defrauded. If the law requires the intent to be charged where the statute expressly dispenses with the necessity of alleging that the party intended to pass upon any particular person, corporation, or company, *a fortiori* would it be necessary where the statute is silent upon the subject. For this defect the indictment is ill, and consequently the judgment founded upon it is irregular and void. The judgment must be arrested and the prisoner remanded to be further proceeded against according to law.

Judgment reversed.