SMITH BELL *vs.* STATE.

To constitute a good indictment under *sec.* 23, *ch.* 51, *Digest, p.* 354, for the fraudulent use of an instrument intended for the counterfeiting of coin current, &c., the manner of the use—how the instrument was used—must be charged—as that defendant used it in making and counterfeiting certain money (specifying it) current in the State, &c., by law or usage.

An indictment alleging generally that defendant did fraudulently use such instrument, without specifying how it was used, is bad.

When all the ingredients of an offence created by statute is expressed therein, it is sufficient to frame an indictment for such offence in the words of the act; yet, if some ingredient be plainly in an elipsis, such must not be omitted in the indictment.

In a criminal case, the jury should be sworn to give a true verdict according to law and evidence. Where the record states that the jury were duly or regularly sworn, this Court will presume that the oath was properly administered; but otherwise, where the record undertakes to set out the oath administered, and it appears not to have been the legal oath, as that the jury were sworn "to try the issue joined." *Patterson vs. State,* 2 *Eng.* 59.

Appeal from the Phillips Circuit Court.

Smith Bell was indicted in the St. Francis Circuit Court, as follows:

"The Grand Jurors, &c., duly elected, &c., &c., upon their oath, do present that one Smith Bell and one Joel Carter, late of, &c., on the 1st June, A. D. 1847, at, &c., one instrument intended for the purpose of counterfeiting coin current in the State of Arkansas, called a press, fraudulently did use, contrary to the form of the statute, &c., and against the peace, &c.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Smith Bell and Joel Carter, late of, &c., on the 1st June, A. D. 1847, at, &c., one other instrument intended for the purpose of counterfeiting coin current in the State of Arkansas, fraudulently did use, contrary to the statute, &c., against the peace," &c.

The defendant Bell pleaded not guilty, after which, on his application, the venue was changed to Phillips.

The cause was determined in the Phillips Circuit Court, at the November term, 1849, before the Hon. JOHN T. JONES, Judge.

The record entry of the swearing of the jury is as follows:

"And thereupon, to try the issue joined in this case, comes a jury, to wit: D. A., &c., &c., twelve good and lawful men of the county, who were elected, tried, and sworn to try the issue joined in this case."

The jury returned a verdict of guilty, and fixed the punishment of defendant at six years and six months in the Penitentiary.

The defendant moved for a new trial, on the grounds that, after the cause was submitted to the jury, and after they had retired to consider of their verdict, part of them separated from the panel, and went to a grocery, in company with the officer in charge of the jury, and drank ardent spirits. And filed the affidavit of the keeper of the grocery in support of the motion. The State filed the cross affidavit of one of the jurors, to the effect, that the jurors who separated from the panel as aforesaid, were indisposed, and, by permission of the officer in charge, and in his company, went to the grocery and took a single drink of spirits, for their health, but that they conversed with no one about the case, and no one spoke to them on the subject of their verdict, whilst so separated from the panel.

The Court overruled the motion for a new trial, and defendant excepted. Judgment in accordance with the verdict; and appeal by defendant.

The counsel for appellant assigned for errors, 1st. That the indictment was bad in substance: 2d. That the jury were not legally sworn: 3d. That the Court refused a new trial: and 4th. That the judgment was against defendant.

ENGLISH and R. W. FARRELLY, for the appellant. The indictment

is bad for uncertainty: 1st. In that it does not charge the *scienter* on the part of the defendant that the instrument alleged to have been used by him was intended for counterfeiting, (see *Arch. Cr. Pl., marg. p.* 516, 517, for precedents); nor that the instrument was adapted to the purposes of counterfeiting, (*Ib.*): 2d. It does not charge how he fraudulently used the instrument.

It is not sufficient to charge the offence in the language of the statute unless the words used clearly embrace all the ingredients of the offence, (*Gabe, alias Santa Anna vs. State,* 1 *Eng. R.* 519), and the indictment must be certain to every intent, and without such intendment to the contrary. *State vs. Hand,* 1 *Eng.* 165. 1 *Ch. Cr. Law* 172.

For correct precedents, see *Commonwealth vs. Kent,* 6 *Met.* 221. *State vs. Collins,* 3 *Hawk.* 191. *Bradford vs. The State,* 3 *Humph.* 370. *Miller vs. The People,* 2 *Scam.* 233. *People vs. The State,* 6 *Blackf.* 95. *State vs. Bowman,* 6 *Verm.* 594. *Scott's case,* 1 *Robinson* 695.

The jury was not legally sworn. It is not sufficient that they "were elected, tried, and sworn to try the issue joined in the case." *Patterson vs. State,* 2 *Eng.* 59.

CLENDENIN, *Att. Gen.,* contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The clause of the statute upon which both counts of this indictment are predicated, (1st clause of *sec.* 23, *ch.* 51, *Dig.* 354,) creates several distinct and substative offences, neither of which is included within the other; and, therefore, when the State proceeds for any one of these, that proceeding for must necessarily be specifically described. The entire statute is one, in an unusual degree, comprehensive. Its great and primary object is to prevent bad money being passed, and this is attempted to be effected by guarding every avenue that leads to this result.

The section relating to coin, immediately before us, begins by making it criminal to make, mend, or prepare, any machine or instrument intended for the forging, counterfeiting or adulterating

any of this kind of currency, being such in this State by law or usage. Then, he who assists or may be concerned in the making, mending, or preparing of any such machine or instrument, is made equally guilty with the actual fabricator, mender, or preparer. Then, the guilty use of any such machine or instrument, is made equally criminal. Then, he who may assist or be concerned in such guilty use. Then comes the guilty possession or concealment of machine or instrument: and, lastly, the offence of assisting in any such concealment. But each one of these several offences converge to one point, that is to say, to "coin which may be current in this State either by law or usage;" and this is necessarily an ingredient in each of these offences severally. Thus, he who makes a machine, knowing it to be intended for the forging of any coin current in the State of Arkansas, either by law or usage, is guilty of one offence, and so of the other several offences perpetrated in the successive acts of progress, all inseparably connected with coin current in the State, either by law or usage. And so the fraudulent use of any such machine or instrument, made criminal as we have seen, is not any and every fraudulent use that may be conceived, but, on the contrary, only such fraudulent use as may be connected with the "forging, counterfeiting, or adulterating of any coin which may be current in this State either by law or usage."

An indictment, then, in which it may be charged in general terms, as in this before us, that the instrument intended for the purpose of counterfeiting coin current in the State of Arkansas was by the defendant fraudulently used contrary to the statute, &c., falls far short of charging, with any reasonable certainty, the offence proceeded for; because no other fraudulent use of any such instrument is denounced by the statute, except only a fraudulent use in forging, counterfeiting or adulterating coin which may be current in this State, either by law or usage. To constitute a good indictment for this offence, not only must the defendant be charged with the fraudulent use of such instrument, but the manner of the use—how it was used,—must be charged, as that the defendant used it "in making and counterfeiting

money in the likeness and similitude of Spanish milled silver dollars, contrary to the statute," &c. Otherwise, the indictment would not be a plain, brief, and certain description of the offence charged against the defendant, and it would be uncertain whether he had used such instrument in forging, in counterfeiting or in adulterating the coin, or in what manner he had used it, and therefore uncertain whether he had committed any offence at all. Although when all the ingredients of an offence created by statute is expressed therein, it is sufficient to frame an indictment in the words of the act, yet, if some ingredient be plainly in an elipsis, such must be omitted in the indictment. (*Santa Anna vs. The State,* 1 *Eng.* 519.) And it is a well settled rule in criminal pleading that when a general term is used in a statute creating an offence in connexion with words more precise, limited and definite in their meaning, the indictment must charge the offence in the particular words used in the statute. On the same general principle, an indictment could not be good that would charge an offence in the general terms of the statute, when other words were used in that same statute restraining the meaning of these general terms manifestly within narrower limits than they in themselves import.

Both counts of this indictment were, in our opinion, clearly bad, and therefore the Court below ought to have arrested the judgment.

The record shows that the jury were sworn only "to try the issue joined." This was irregular: they should have also been sworn to give a true verdict according to law and evidence. (*Patterson vs. The State,* 2 *Eng.* 59.) Had it been stated on the record that the jury were duly or regularly sworn, we would have presumed that the oath had been properly administered.

Let the judgment be reversed, and the cause remanded, that the defendant may be proceeded against on another indictment to be preferred against him.