UNITED STATES v. ANDREWS.

[2 Paine, 451.][1]

Circuit Court.[2]

INDICTMENT—CONCLUSION—STATUTE.

An indictment for an offence created by statute, charging the same to have been committed "in contempt of the laws of the United States of America," without referring to the statute, is bad.

The prisoner [John Andrews] was indicted for a perjury, under the thirteenth section of act of 3d March, 1825, c. 506 (7 Laws U. S. p. 397, c. 506 [4 Stat. 118]), committed while under examination as a witness, before the district judge, in the matter of an assault with a dangerous weapon charged against other parties. The indictment contained two counts, both concluding, "in contempt of the laws of the United States of America." It was moved "in limine," to quash the same, upon the ground that it did not adequately charge the offense to have been committed against any statute of the United States, and could not be sustained as at common law; and the following cases were cited in support of the motion: Com. v. Stockbridge, 11 Mass. 280; U. S. v. Davis [Case No. 14,930]; Starkie, Cr. Law, 253; 4 Bl. Comm. 119, 123.[1]

J. A. Hamilton, for the United States.

W. Q. Morton, for the prisoner.

After advisement, THE COURT, per THOMPSON, Circuit Justice, ordered that the indictment be quashed.

And if there be any exception contained in the same clause of the act which creates the offence, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within

the exception. Id. 275; 1 Term R. 141; 15 East. 456: 1 East. 643: 2 Leach, Crown Cas. 580, Russ. & R. 174, 321: But if an exception or proviso be in a subsequent clause or statute (1 Term R. 320), or although in the same section yet if it be not incorporated with the enacting clause by any words of reference (1 Barn. & Aid. 94), it is in that case matter of defence for the other party, and need not be negatived in the pleading (Matt. Dig. 275; Archb. Cr. Pl. 48. 3 Chit. Burn, Just. 456).

It is generally, but not always, sufficient, in an indictment for a misdemeanor created by statute, lo describe the offence in the words of the statute. People v. Taylor, 3 Denio. 91. In an indictment for setting on foot a lottery, contrary to the statute, it is essential to specify the purpose for which the lottery was made; that being a part of the statute description of the offence. But a general statement of the purpose for which the lottery was made, is not enough. Some further description must be given where it is practicable to do so. Id.

There is no necessity to recite any public statute on which the indictment is founded; for the judges, ex officio, take notice of all public statutes. Dyer 155a; 2 Hawk. P. C. c. 25. § 100; 1 Saund. 153, note 3. But if it be recited with a material variance, and the indictment conclude "contrary to the form of the said statute." it will be fatal, though if it conclude generally, as, "contrary to the form of the statute in such case made and provided," without referring to the recited statute, the recital may be rejected as surplusage. 2 Hawk. P. C. c. 25, § 101: 6 Term B. 776. But the parts of a private act on which an indietme it is framed, must be set out specially, as other facts, and a variance properly shown to the cour will be fatal. 2 Hawk. P. C. c. 25. § 103. Neither the day on which a private statute was enacted, nor the title or preamble, need in any case be stated. But if set forth, it must be done with

correctness, or, if the indictment conclude (optrary to the statute aforesaid, the variance will be fatal. 1 Chit. Cr. Law, 277: Holt. 062: 2 Ha vk. P. C. c. 25, § 106.

[1] {Reported by Elijah Paine, Jr., Esq.}

[2] {District and date not given. 2 Paine includes casts decided between 1827 and 1840.}

[1] Whether the statute be public or private, the indictment must state all the circumstances which constitute the definition of the offence in the act, so as 10 bring the defendant precisely within it: and must with certainty and precision charge him with having committed or omitted the acts constituting the offence, under the circumstances and with the intent mentioned in the statute. 1 Hale, P. C. 517, 526, 535. The defect will not be aided by verdict (2 East, 333), nor by a conclusion contra formam statuti (2 Hale, P. C. 170; Fost. Crown Law, 423, 424). See 8 Term R. 536. Nor will the fullest description and legal definition of the offence he sufficient without keeping close to the expressions of the statute (Fost. Crown Law, 424), which should be pursued in the precise and technical language used in the statute (Id.; 2 Hawk. P. C. c. 25, § 110). Thus, for rape, no expressions of force and carnal knowledge will excuse the omission of the word "ravished." 2 Hawk. P. C. c. 23. § 77 So if a statute make it criminal to do an act "unlawfully and maliciously," it must stated to have been done "unlawfully," "Feloniously, voluntarily and maliciously," is not enough. Ryan & M. Cr. Cas. 239, 247. But where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. As if the word "knowingly" be in the statute, and the word "advisedly" substituted for it in the indictment (1 Bos. & P. 181); or the word "wilfully" in the

statute, and "maliciously' in the indictment, (the words "advisedly" and "maliciously" not being also therein,) the indictment would be sufficient. Yet, it is better to pursue strictly the words of the statute; as the court, in favorem vitae, are sometimes inclined to listen to and countenance very nice distinctions upon the subject. Where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it. Matt. Dig. 200. 275; 2 Leach, Crown Cas. 664; 2 East, P. C. 928.