CROWN SIDE.

THE KING *v.* SHADIAPEN [1800, *Thursday, May 1st.*]

In an indictment containing two counts, one for forging, the other for uttering, the instrument, must be set out in both; otherwise, if it be set out only in the count for forging, and the prisoner is acquitted upon that, and convicted on the other, judgment will be arrested.

Whether, if in the *Tamil* language, it must be set forth, or whether a translation by the Court interpreter will not do?

THIS was an indictment consisting of two counts; one for forging a paper writing, purporting to be the will of one *Pearse Vencatash*, the other for uttering it, knowing it to have been forged. The will was set forth in the first, but not in the second count, in which latter it was only described, as having been delivered in and filed by the prisoner, in the Court of the Recorder. Upon the trial, the jury having convicted the prisoner on the second count only, it was moved by *Hall* to arrest the judgment on several grounds, but principally for the defect of the second count, in not containing a statement of the paper, writing purporting to be the forged will, which, on the au- **[53]** thority of the case of *Zenobio* v. *Antill* (a) he contended should have been set forth in *Tamil*, the language in which it was written. *Anstruther*, for the prosecution, shewed cause; and now, this last day of the Sessions, the *Recorder* delivered the opinon of the Court.

Recorder. The prisoner at the bar has been convicted of uttering a paper writing, purporting to be a will, knowing it to have been forged; and however satisfied we may be of his guilt, if the count in question is essentially defective, the judgment must be arrested.

The indictment consists of two counts; in the first of which, for the forgery, the paper in question is set forth. Of this the prisoner has been acquitted; but it has been contended for the prosecution, that the indictment is to be considered as one entire narrative, the different counts of which communicate, and refer from the one to the other. But for this, no authority was cited.

In one view, it may be considered as an entire narrative, like a declaration. It is a narrative by the same persons, to wit, the grand jury, of and concerning the same person, namely, the prisoner; and, in this sense, there are terms of reference in the different counts, as "the jurors of our Lord the King further present," etc., and "the said *Shadiapen*," meaning always the prisoner, so as to preserve throughout the connection and identity of parties, who are still the same.

But it is a narrative, consisting often of several parts; and in any other point of view than that which **[54]** I have mentioned, each count is as distinct from those that precede, or follow, as if it were part of a different indictment.

Accordingly, the grand jury may find a bill to be true as to one count, and endorse *ignoramus* as to all the rest; and, if they do, it leaves the indictment, as to the count which the jury affirm, just as if there had originally been only that one count. The Court can look at those that are disaffirmed, for no other

[53] (a) 6 Term. Rep. 162.

purpose but that of preserving the formal connection. This was so decided in *Rex* v. *Fieldhouse* (a).

So the petty jury may, as it has done here, acquit of one and convict of the other, and the same consequence will follow. The Court can only, to any essential purpose, look to the one of which the jury have found the prisoner guilty.

This being so, the question is, whether the count before us is of itself [without referring to any thing out of it] sufficient, in point of law, for the Court to pass sentence upon; and for the reason principally relied upon by *Mr. Hall*, that the instrument in question is not set forth in it, we think it is not.

It was assumed by the counsel for the prosecution, as the only principle upon which the necessity of setting out the instrument could be contended for, that upon a subsequent prosecution for the same offence, the prisoner might be able to prove his plea of *anterfois-convict, or anterfois acquit*; and it was insisted, that such means of proof are sufficiently furnished him, here, by the specification in the count in question, that the will described in it had been delivered in, and filed in the Court of the Recorder.

[55] But if, as contended, this were the only consideration, I should be of opinion that the count in question is defective in as much as the identity of the subject matter of two successive indictments must be much more capable of proof, if specifically set forth, than if only alluded to and described, be it by circumstances however particular.

But this is not the only consideration. A much more important one is, that the Court may, in every stage of the prosecution, from beginning to end, have an opportunity of seeing, not by intendment [for there can be no such thing on indictments], but by inspection, on the face of the record, that the note, bill, deed, or instrument, whatever it be, of which the crime is alleged, is what it is supposed, and said to purport to be; for this is of the essence of the offence; and every thing that is so, must be set forth(a).

It was admitted that, in the case of libel, the words themselves must be set out, that the Court may have an opportunity of judging on the face of the record, whether it is a libel. For precisely the same reason, that, whatever it be, of which forgery, or the uttering, knowing it to have been forged, is alleged, must appear in every count, upon which a prisoner can be well convicted.

The case of the *King* v. *Jones* (b), tho' it does not decide the necessity of such a mode of drawing these counts, may be referred to as a precedent, while it shews the importance of the principle. It was an indictment consisting of six counts, some for the forgery, others, as here, for the uttering; **[56]** but with this difference, that in the counts in the indictment in *Douglas* for the uttering, as well as for the forgery, the note that was the subject matter of it was set out.

It was set out, as purporting to be a bank note; and a special verdict, on the count for uttering, found that the prisoner had so represented it to the person who had been defrauded by him.

But the judgment was arrested on the ground of it's not being in point of law, what the count in question stated it purported to be; and tho' the

[54] (a) Cowper, p. 325. **[55]** (a) See Lyon's case, 2 Leach, 696. (b) Doug. p. 300.

representations of the prisoner respecting it might have justly subjected him to a prosecution for the cheat, yet he could not be convicted upon that indictment, the note not being in truth of the kind which the count in question supposed it.

To apply this. What is called in the count in question here, the will of *Pearse Vencatasah*, might turn out, if inspected, not to be an instrument of that nature, or not available to any valuable or fraudulent purpose, as such. But the Court can only now look at the indictment; and the only part of it that remains before us. *viz.*: the count for uttering, discloses nothing of it, either in form or substance, but only describes it. The Court therefore is left to intend, that it is, as it is said to purport to be: but one of the first principles of the law of indictment, is, that nothing can be intended, even after verdict.

There is a case in *Ventris* (a) that applies more directly perhaps to the point in question, than the case in *Douglas*, tho' the subject matter is different.

[57] It is the case of some constables, who were indicted for neglecting to execute several precepts and warrants, directed to them by the bailiffs of Ipswhich, under their hands and seal, etc. And it was moved to quash it, for that the nature and tenor of the warrants were not expressed in the indictment; "For, unless the parties know particularly what they are charged with, they "cannot tell how to make their defence." And for that reason, (says the report) it was quashed by the Court.

Now the Court never quash an indictment unless the ground is too clear to admit of argument.

If no case is to be found in which it has been decided, that in counts for uttering, as well as in those for the forgery, the instrument must be set out, the reason must be, that the invariable practice is to set it out. So it appears from all the precedents I have had an opportunity of examining. The same may be collected from the reports of various cases, in which the subject matter of the counts is described by the reporter:—the case in *Douglas*, is an instance amoung many. And it is remarkable that in the very precedent in the Crown Circuit Companion, from which the count in question is understood to have been drawn, the substance of the *fieri facias* is so set out, as to enable the Court to see that it was a writ of *Fi: fa:*, and to render it perfectly capable of identification. Whereas here, the whole is left to intendment.

The Court is not now called upon to say, whether it should have been set out in the language in which it was written, being the Tamil. If it were, I should think, notwithstanding the case of *Zenobio* v. *Antill*, that the insertion of a translation by the Court in-**[58]** terpreter would have been sufficient, considering our total unacquaintance with even the character of the native langauges, and the circumstance of our having a standing sworn interpreter, to whose acts we are in the daily habit of giving implicit credit.

But it is sufficient to say here, on the authority of the cases in *Douglas*, and *Ventris*, on the reason of the thing, and on the course of the precedents, that the judgment must be arrested; and the prisoner of course be discharged.

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[56] (a) *Borrough's case, I Ventr. 305.*