two counts one charging a felony and the other a misdemeanor is substantially vicious, as is contended for on part of prisoner. The exception taken to the Indt. is attempted to be supported by assimilating the proceedings in Criminal Trials to those in civil cases which is not correct to the extent contended for - If entire Damages be assessed on a Declaration containing several counts any one of which is bad it is error: but there is no principle better established than that if a general verdict of guilty be founded on an Indictment containing several Counts it is sufficient if one is good although all the rest are bad. It is objected that a felony and misdemeanor can no more be charges in the same Indt. than assumpsit and tort can be joined in the same Declaration. But the reasons given in the books why certain different causes of action may not be joined in the same Declaration are that the process is different that they do not admit of the same general plea and are not followed by the same Indt. and here again the analogy contended for between the proceedings in Criminal and Civil cases does not hold for it has been long settled that an Indictment may charge several felonies of different grades and requiring different legal Judgts as offences clergyable and offences not clergyable such as murder and manslaughter. Burglary and Larceny &c. and that the party may be acquitted of one of the offences charged and convicted of the other and receive Judgt. accordingly - and if so there is no substantial reason why a Rape and an assault with intent to commit a Rape may not be charges in the same Indt. for leaving the act of 1793 out of consideration the legal Judgts. required on two such counts are not more dissimilar than an two Counts one charging Burglary and the other Larceny &c. and it is laid down in 1st Term Rep. 276. 2nd Will and others that whenever the same plea may be pleaded and the same Judgt. given on two Counts they may be joined in the same Declaration. Now apply that rule to the Indt. in this case and the objection falls: for in this state the legal process on each of the offences charged is the same: they admit of the same general plea and by the act of assembly 1793 ch 57 sec 10. the same Judgt. may be pronounced - It has been further urged that a felony

(and)

and a misdemeanor cannot be laid in the same Indt. because they require different modes of trial: in one charge the party accused having a right of challenge and in the other not - and also being subject to arraignment on one and not on the other - But neither the arraigning a man on an Indt. for a misdemeanor or indulging him in a peremptory challenge is error after verdict. That objection therefore fails in reason as it relates to the misdemeanor, nor does it appear to have any more weight as it applies to the charge of Felony for the party accused having no right to peremptory challenges on the Count for a misdemeanor could not by the addition of that Count be in any manner prejudiced in his challenges or otherwise on the Count for felony before the act of 1802 ch 69. It is true that in this state under that act of assembly a party indicted for a misdemeanor is entitled to a pannel of twenty Jurors four of whom he may strike out, but that affords no stronger argument against the uniting a felony and a misdemeanor in the same Indt. than the right which every one charged with a capital offence has to twenty peremptory challenges does to the joining several capital felonies in the same Indt. and it is a settled principle that different felonies may be charges in the same Indt. and though they might confound the prisoner in his defence or prejudice him in his challenges for he might have reason to object to a Juryman's trying him on one of the Counts whom he would wish to be sworn on the others. yet it is no objection to the Indt. after verdict. Why then should the addition of a Count for a misdemeanor vitiate an Indt. charging a felony. But as to prevent prejudice to prisoners in their challenges and confusion in their defences, Courts may and perhaps ought before the Jury are charges to quash Indictments, containing seperate and distinct felonies or to make the prosecutor elect on which Count he will proceed; so for the same reason and particularity since the act 1802 ch 69. there would be a propriety in pursuing the same rule in relation to Indicts charging a felony and a misdemeanor - If as it is alleged no case of an Indt. charging a felony and a misdemeanor is to be found in the Books, it affords no argument against the correctness of such an Indt. the case may never have arisen or the principle may never have been questioned and therefore not

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