reported - and if this is a question of first impression it must be decided on principles of analogy to other cases and thus tested the Indt does not appear to be defective. not on account of the modes of trial in cases of felony and misdemeanor being different for it is no objection after verdict that a Traverser on an Indt for a misdemeanor was arraigned or indulged with a peremptory challenge. In 2d East's Crown law 1023 and 1029. 2d Hawkins pleas of the crown 625 & Kelings rep 29 it is laid down as settled law that if the special circumstances of the case be set forth in an Indt for an offence laid as felony and the Defdt be found guilty generally and afterwards the Court should be of opinion that the fact does not amount to felony but only to a Trespass. Judgt may be given as for a trespass only. In such a case the party accused would be arraigned and have his challenge and yet the offence contained in the Indt only a trespass or misdemeanor though charged as a felony - and the principles so established may perhaps be applied with force to the present question in all its parts for if a misdemeanor may be charged as a felony and punished as a misdemeanor why may not a felony and a misdemeanor be laid in the same Indt and the party be acquitted of the felony and found guilty of the misdemeanor, & converso. not on account of the party being liable to be prejudiced in his challenges or the Jury perplexed in the application of the Testimony - for the same objection might be urged and with more force to an Indt charging seperate and distinct felonies. and yet such indictments are held to be good. and not because the different counts would require different legal Judgts for different felonies may be laid in the same Indt which are differently punished and require different legal Judgts such as murder and manslaughter, Burglary & Larceny &c. Moreover an Indt charging a Rape and an assault with an intent to commit a rape is less objectionable here than in England; for in this state under the act of 1793 Ch 57 sec 10 a conviction of either offence may be followed by the same legal Judt. In this particular case the two offences charges in the Indt are connected together and the misdemeanor merges in the felony; no evidence

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could have been admissible on one count that was not applicable to the other which guards it against the objection that the Jury might be confused in the application of Testimony of a different nature and goes to shew the compatibility of the two counts - or if the misdemeanor is to be considered as a seperate and distinct offence committed at a different time and not a constituent part of the felony charged. it does not alter the case - The great strictness observed in criminal prosecutions grows out of the benevolent principle, that every prisoner should have a fair and impartial trial and this the prisoner in the present case has had - The atty for the state as he had a right to co. abandoned the second count and elected to proceed on the first upon which the Jury were accordingly sworn and charged. There was no application to quash the Indt nor any objection made at the Trial to the form of proceeding. but the prisoner chose to take his chance before the Jury on the charge of felony. to which the Trial was exclusively confined; he was not, nor could he in any manner have been prejudiced by the addition of the second count which being abandoned before the Jury were sworn stood as inoperative as if the Grand Jury had found the Indt a true Bill as to the first count and endorsed ignoramus on the second. which they might have done and the Indt have been good as to the count found a true Bill - He had under this mode of proceeding every privilege and advantage which he could have had, if the Indt had contained only the count on which he was tried. and now to arrest the Judgment would be a perversion of Justice; upon the whole in the opinion of the Court the reasons assigned in arrest of Judgment are unsupported - And thereupon it is forthwith demanded of the said Thomas Burke if he hath or knoweth any thing further to say, wherefore the said Court here ought not upon the premises and verdict aforesaid to proceed to Judgment and execution against him: who nothing further saith unless as he before hath said: Whereupon all and singular the premises being seen and by the Court here fully understood, it is therefore considered by the Court here that the said Thomas Burke be taken to the Gaol of Washington County from where he came and from thence to the place of execution at such time as shall be duly appointed and there be hanged by

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