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THE EXTENT TO WHICH THE COMMON LAW IS APPLIED IN DETERMINING WHAT CONSTITUTES A CRIME, AND THE NATURE AND DEGREE OF PUNISHMENT CONSEQUENT THEREUPON.

PART II.

HAVE THE NATIONAL COURTS OF THE UNITED STATES A COMMON LAW CRIMINAL JURISDICTION?

1. Subject of the second part stated.
2–5. The manner in which the United States courts obtain their jurisdiction.
6–8. *Henfield's Case* stated and considered.
9, 10. This case properly decided on principles of international law.
11, 12. *Ravara Case* stated. The question not raised in this case.
13. Question first fairly raised in *The United States* v. *Worrall.*
14. Again considered in the *Hudson and Goodwin Case.*
15. Judge STORY's decision in *United States* v. *Coolidge.*
16. Not sustained in the Supreme Court.
17. Other decisions adverse to Judge STORY's views.
18–20. *United States* v. *Williams* put on same ground with *Henfield's Case.*
21. Cases generally against the holding of Judge STORY.
22. Several leading text-writers indorse his views.
23. Position taken by them considered unsound.
24–29. Numerous recent cases opposed to their view, settling the question.
30–33. View of Judge TUCKER, &c., agrees with these cases.
34–42. The correct view of the application of the common law in the United States courts.
43–45. Evils resulting from this limited common-law power.
46. Such evils inseparable from codes that exclude common-law principles.
47. Codes to receive consideration.
48–51. Chancellor Kent's criticism of Livingston's Louisiana Code.

52–54. Remarks in reference to the Code Napoléon.

55. From the evils incident to codes, not surprising that the United States courts should experience difficulty from their limited common-law power.

1. THE next question for consideration is, How far the common law of England is to be considered as applicable to the United States, at large, and to what extent it is to be adopted as a rule in criminal cases, arising in the tribunals of the nation, where no written law has been provided by Congress, defining crimes and affixing their punishment? Or, in other words, Have the national courts of the United States a common law criminal jurisdiction? This would seem now to be a question of quite as much political, as of legal, importance.

2. Before entering upon the examination of this question it may serve to make clearer what may be presented upon the subject, if the acts, under which the United States courts exercise their jurisdiction, are enumerated.

3. By a comparatively-late act (Act 23d August 1842, § 3), the jurisdiction of the District Court has been extended, concurrently with the Circuit Court, to all crimes and offences against the United States, the punishment of which is not capital. The exclusive jurisdiction of the Circuit Court is, therefore, confined to those offences against the United States not vested concurrently, by Act of Congress, in the courts of the several states, and which may be punished capitally. In such cases, however, its jurisdiction is final, unless the judges disagree on a point, which may be certified to the Supreme Court: Act 29th April 1802, § 6.

4. The Supreme Court derives its jurisdiction from the Constitution, art. 3, §§ 1, 2. The only *practical* original jurisdiction which it can be said to possess is that inherent in all courts to punish for contempts offered to its dignity, by fine and imprisonment: per JOHNSON, J., in *United States* v. *Hudson and Goodwin*, 7 Cranch (S. C.) 32. The Supreme Court, as stated above, has also appellant jurisdiction in criminal cases when the judges in the Circuit Court disagree, and certify the case to the Supreme Court sitting in banc.

5. By the Act to establish the Judicial Courts of the United States, it is declared (Act 24th September 1789, § 11) that the Circuit Court shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States,

except where this act otherwise provides, or the laws of the United States otherwise direct; and concurrent jurisdiction with the District Courts of crimes and offences cognisable therein. This act confines the jurisdiction over offences against the United States to the national courts, unless otherwise specified, so it is important that the question be decided as to the common-law jurisdiction of the national courts in criminal cases, where the offence is not cognisable by the courts of any particular state. For, if the common law is not allowed full force in such cases, then the national courts will have criminal jurisdiction only where there is an express statute providing for the case, or class of cases, under which the offence may fall. If they have not full common-law power it is manifest that, in all such cases, and where there is no such direct provision made by statute, offenders against the universally-acknowledged laws of nature may pass unscathed.

6. The proper consideration of this important question, which has been so frequently and ably examined, will involve the necessity of presenting, in detail, the leading cases in which the matter has been considered. One of the first in point of time, and the one that has been the most strongly relied on by some writers (Wharton, *e. g.*, in State Trials, p. 88 n.), who have fancied that they could establish by it a strong presumption in favor of a full common-law jurisdiction in the United States courts, is the celebrated *Case of Gideon Henfield*, Whart. St. Trials 49.

7. The defendant was charged (July 1793) with a violation of neutrality, by sailing and cruising in a privateer, commissioned by the French government, and acting against vessels belonging to the British government; the defendant being a citizen of the United States, a neutral power. Judge WILSON, *in his charge to the grand jury*, put the question as one of a violation of the law of nations, and that the infractions of that law form a part of the criminal jurisprudence of the common law. The grand jury returned an indictment against Henfield, for acting "*in violation of the laws of nations*, and the constitution and laws of the said United States of America, and against the peace and dignity of the said United States of America." The petit jury returned a verdict of not guilty.

9. When the United States became a member of the great family of nations, one of the obligations which was unquestionably

cast upon her, was to be governed by the great principles of international law, as recognised by all civilized nations. The question was not whether the common law, as existing in England, contained international law as one of its ingredients. That did not at all affect the question. Other nations, as France, Russia, Prussia, Austria, &c., &c., which have an entirely different system of law from the common law of England, are all, as a matter beyond dispute, governed by the laws of nations; and, whether the United States had, or had not, adopted the English common law, they would have been alike bound to act upon and preserve inviolate the recognised principles of international law. That, in doing this, they had a right to use, as the machinery for enforcing the principles of the laws of nations, the forms of law which they recognised, as the grand jury, the petit jury, bills of indictment, system of pleading and evidence, &c., &c., which are a part of the common law,—no one, whatever, has denied. This was all that was necessary to be held in the case, and it is submitted that the case is, indeed, authority for nothing further; the loose expression of Judge WILSON, in his charge to the grand jury, being purely extrajudicial.

10. It is worthy of note that this case has been very generally cited recently, in connection with the question in dispute with England, arising out of the "Alabama" matter, to establish the single point that the fitting out of vessels, by a subject of a neutral power, to be used against one of two belligerents, is a violation of neutrality upon principles of international law. To prove this very liberal citations have been made from Vattel, Grotius, Bynkershoek, and other old writers on international law. This, really, is all that the case can be held to have decided.

11. The next case to be noticed is that of *The United States* v. *Ravara*, 2 Dallas 297, tried in April 1793, a few months prior to the trial of the Henfield case. The question of the common-law jurisdiction of the United States national courts had never been brought up before, and was not mooted at all in this case. The principal question considered was as to the relative jurisdiction of the Supreme Court and the Circuit Courts of the United States, over offences committed by consuls. WILSON, J.,—with whom agreed PETERS, J.,—merely said: "I am of opinion that, although the constitution vests in the Supreme Court an original jurisdiction, in cases like the present, it does not preclude the

legislature from exercising the powers of vesting a concurrent jurisdiction, in such inferior courts, as might by law be established. And as the legislature has expressly declared that the 'Circuit Court shall have exclusive cognisance of all crimes and offences, cognisable under the authority of the United States,' I think the indictment ought not to be sustained." IREDELL, J., differed with this merely on the ground that the term "original" seemed to mean "exclusive," and because he thought that the constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the public agents of foreign nations.

12. As has been observed, the question of the national courts having a common-law jurisdiction where offences were not otherwise created or declared by the constitution or by statute, was not once adverted to. The case, therefore, under the circumstances, cannot be considered of much authority on the point.

13. In *The United States* v. *Worrall*, 2 Dallas 384 (A. D. 1798), the question may be said for the first time to have been fairly and directly brought before the court. The charge against the defendant was for an attempt to bribe the commissioner of the revenue, when the court,—CHASE, J., and PETERS, J.,—divided on the subject, and the case not having been carried up, the question was left undecided.

14. The next case to this, of importance, to be noticed, on this question, is the case of *The United States* v. *Hudson and Goodwin*, 7 Cranch 32 (A. D. 1812), where the point was again raised. This time it was before the Supreme Court on a case certified from the Circuit Court for the District of Connecticut, where the judges had divided in opinion on the question whether the Circuit Courts of the United States have a common-law jurisdiction in cases of libel. The question is put more broadly than this by the court, namely, as to "whether the Circuit Courts of the United States can exercise a common-law jurisdiction in criminal cases;" and a majority of the court, reasoning very much in the same way that Mr. Justice CHASE did in *The United States* v. *Worrall*, decided that the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence," before such court can take cognisance of the offence. The powers possessed by those courts, not immediately derived from statute, being such

as are necessary to the powers of a court, as to fine for contempt, imprison for contumacy, &c.

15. The question came up again, during the following year (A. D. 1813), in the case of *The United States* v. *Coolidge et al.*, 1 Gall. 488, in the Circuit Court for Massachusetts, in which Mr. Justice STORY took the broad ground that the United States national courts have jurisdiction over common-law offences. DAVIS, J., did not concur with Judge STORY, in order that the question might again be taken before the Supreme Court, as the previous case of Hudson and Goodwin, *supra*, had been decided without argument, and by a divided court. As it will be necessary again to advert to the arguments of Mr. Justice STORY, they are not dwelt upon here.

16. The case of *The United States* v. *Coolidge*, 1 Wheat. 415, came before the Supreme Court, but the attorney-general stated that, after anxious attention and an examination of the decision of the court in *United States* v. *Hudson and Goodwin*, he declined arguing the question, and a majority of the court, although they were willing to hear an argument on the point, decided, on the authority of the previous case, that the national courts have no jurisdiction over common-law offences against the United States.

17. Two other cases, decided in the Supreme Court by Chief Justice MARSHALL (*United States* v. *Bevans*, 3 Wheat. 336, and *United States* v. *Wiltberger*, 5 Id. 76), are considered as being governed by the assumption that the United States courts have no jurisdiction over offences at common law, and another Supreme Court case (*United States* v. *Aaron Burr*, 4 Cranch 500) contains a similar idea. The reasoning of the same learned judge (C. J. MARSHALL) in still another case (*Marbury* v. *Madison*, 1 Cranch 137; see p. 176) is to the same effect.

18. The case of *Isaac Williams*, 1 Tucker's Blackstone 436, tried in the District Court of Connecticut in 1797, involved a question very similar to the one decided in *Henfield's Case*, Whart. St. Trials 49, in which the decision really was, that a citizen has not the right or power of expatriation. The expression that "the common law of this country remains the same as it was before the revolution," made use of by Mr. Chief Justice ELLSWORTH, is, it is conceived, even as regards the national courts, perfectly true *to the extent to which it was necessary to*

hold it so, in the case in question. To that extent it is consistent with the actual holding in *Henfield's Case*, that, as the act was a violation of the great principles of international law, by which all nations are governed, the common law is to be looked to in such cases, not for the declaration of crimes and punishments against the laws of nations, but for the rules and forms of proceeding by which the principles of international law are to be carried into effect. It was not at all necessary for the court to hold that it derived its jurisdiction over the offence by virtue of the force or authority of the common law. If there was no common law whatever in the country, the authority in such cases would be equally as clear as it is now. This case and *Henfield's Case* are both authorities to the effect that the national courts have jurisdiction over the citizens of the United States, for violations of its neutrality, but these cases can be sustained without the doctrine being upheld that the United States courts possess a common-law criminal jurisdiction.

19. Even Professor Du Ponceau, who, in his work on Jurisdiction, has so strenuously argued for the distinction made by Judge STORY—yet to be more particularly adverted to—in the Coolidge case, virtually admits this. In his remarks on *Henfield's Case*, he says: "It would seem that the *common law*, considered as a principal system, had nothing to do with this case. The law of nations, being the common law of the civilized world, may be said, indeed, to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country in a war. Every branch of the national administration, each within its distinct and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere *proprio vigore*, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental principles. Whether there is or is not a national common law in other respects, this *universal common law* can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state:" Du Ponceau on Jurisdiction 3, n.

20. On precisely the same ground the decision in the Williams case can be sustained; and there is, really, no antagonism between these cases and those of Hudson and Goodwin and Coolidge. And, in the repeated arguments on this question, the point has almost always been put as to whether these latter cases, having been decided without argument, and by a divided court, can be considered as overruling the former, when, really, without any inconsistency, they can all be sustained together.

21. The only decided case,[1] then, that can be said at all to sustain the idea of a common-law jurisdiction over crimes, in the national courts, is the Ravara case (see *supra*), in which, as has been seen, the question was not mooted at all, and the decision was put on a ground that has no direct bearing on the point at issue.

22. The cases above considered, and some few others of a kindred nature, have been elaborately discussed by a number of very able jurists. Mr. Du Ponceau, in a treatise (cited *supra*) on the question, has strongly endeavored to enforce the distinction, first drawn by Judge STORY in the case of Coolidge, that, although the national courts of the United States cannot primarily derive jurisdiction from the common law, yet, when they gain jurisdiction over the person, place, or subject-matter, by the constitution, or by statute, then the common law comes in and declares what are offences and how they shall be punished; if no provision to that effect is made by statute. This view of the question is concurred in by such able writers as Dr. Rawle, in his work on the Constitution, chap. 29; by Chancellor KENT, in his Commentaries, vol. 1, pp. 364–373; and, again, by Judge STORY, in his work on the Constitution, vol. 1, p. 106 n. and 552 *et seq.* (last ed.); all of whom cite approvingly from Du Ponceau. And see Whart. St. Trials 88, n.

23. However, notwithstanding this brilliant array of names, it is conceived that the position taken by these able jurists, *to the extent to which it is taken*, cannot be sustained.

24. In addition to the cases previously considered, it was laid down by WASHINGTON, J., to the grand jury (Circuit Court, Philadelphia, October 1822), that the national courts of the

[1] But see *United States* v. *Smith*, cited 6 Dane's Ab., p. 718 n, 3, § 4, which seems to have escaped the notice of Judge STORY, and the other judges and writers who have contended for the common-law jurisdiction.

United States have not cognisance of offences at common law, until the jurisdiction is specially given to them by the laws of the United States: Sergt. Con. Law 345, n. To the same effect is *Ex parte Bollman and Swartwout*, cited in Conkling's Treatise on the Jurisdiction of the National Courts, p. 83.

25. A series of quite recent cases shows that the principle is considered by the courts as fully established, and no longer a matter of doubt,—although otherwise alleged in the very latest editions of the text-books cited, and in other late works,—that the United States national courts have no jurisdiction over crimes until such jurisdiction is specially conferred by Congress,—naming the crime, and declaring the punishment, and pointing out the court which shall have jurisdiction over the offence.

26. Thus, in *The United States* v. *Lancaster*, 2 McLean 433 (A. D. 1841), the court held that "the Federal Government has no jurisdiction of offences at common law. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act criminally except as the law provides."

27. In another case (*United States* v. *New Bedford Bridge*, Woodb. & Min. 401), tried A. D. 1846, the court say,—"It is furthermore held that if Congress does not declare particular acts to be offences, and prescribe the extent of punishment and place of trial, though the subject-matter is within the power granted to the General Government, no particular court has any right to try a person for doing these acts, or affix any punishment to them, as every court under the General Government is limited to the trial and punishment of such matters, and such only, as Congress has been pleased to confide to it. It has been repeatedly held that though certain powers are granted to the General Government, it is considered that no acts done against them can usually be punished as crimes without specific legislation. Thus, it is said 'the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence:'" Ibid. 435. Again,—"The common law of England has been considered as not put in force, directly or indirectly, by means of any clause in the constitution of the United States, so as to create, make, or help to make, anything an offence, which has not been made so by the constitution itself, or Acts of Congress passed under it:" Ibid.

28. There are several other cases which are considered by

commentators on the subject, as also sustaining this position. The only case, further, however, that will be here cited on the point is a still later one than any of those others cited, and one, which, it is conceived, has not been alluded to by any of the text-writers. The case was decided in March 1856 (*United States* v. *Wilson*, 3 Blatch. C. C. 435), in the Circuit Court for the Southern District of New York, before NELSON and BETTS, JJ. It is emphatically laid down as "a fundamental doctrine, in respect to the Federal courts of inferior jurisdiction, that they cannot take cognisance of criminal offences of any grade, without the express appointment or direction of positive law. To enable them to exercise the functions bestowed by the constitution over crimes and misdemeanors, there must be a designation by positive law both of the offence and of the tribunal which shall take cognisance of it." This is carrying the doctrine to the extremest limit, and, in one respect, is stronger than any of the other cases named.

9. When the limited jurisdiction of the Supreme Court of the United States is considered,—as named in a previous part of this treatise (see *supra*, p. 2, § 4),—it may be deemed a point pretty effectually settled, that the doctrine, in relation to this question, upheld by Professor Du Ponceau, by Dr. Rawle, by Mr. Justice STORY, and by Chancellor KENT, *to the extent to which they carried it*, is, notwithstanding the weight of those deservedly great names, held, conclusively, not to be law.

30. As a partial offset to these great names, and to show that all the commentators on the question have not been of the same mind, brief extracts are given from a few eminent writers who have given expression to views similar to those entertained herein.

31. Judge TUCKER, in his edition of Blackstone's Commentaries, vol. 4, No. 10 of Appendix, Tucker's Va. Blk., draws the following conclusions:—

(1). "That the Federal courts possess no jurisdiction whatever over any crime or misdemeanor, which is an offence by the common law only, and not declared to be such by the constitution or some statute of the United States.

(2). "That, although a certain class of offences may, by the constitution of the United States, be declared to be within the jurisdiction of the Federal courts, yet those courts cannot pro-

ceed to take cognisance thereof, unless they be first defined by the constitution, or by statute; nor to punish them until the punishment be likewise prescribed by a statute of the United States." He cites approvingly from Judge CHASE'S argument in *The United States* v. *Worrall*, 2 Dallas 394, which, he considers, rests upon a "solid foundation."

32. "It is to the statutes of the United States, enacted in pursuance of the constitution, alone," says Judge CONKLING in his Treatise on the Jurisdiction of the National Courts, p. 83, "that these courts must have recourse to determine what constitutes an offence against the United States. The United States have no unwritten criminal code to which resort can be had as a source of jurisdiction."

33. And, in Sergeant's Constitutional Law, is the following conclusion:—"It seems the judiciary department of the United States does not possess the implied power, to introduce and carry into effect the criminal code of the common law, on the plea that it is necessary to promote the end and object of its creation, and to preserve the government. The legislative power is vested in other departments, and till they make an act a crime, and affix a punishment to it, it is to be regarded, in the view of the judiciary of the United States, as innocent. (Even, though, as in one case, the crime be *manslaughter*, as it was; or, in another case, rape! Such is the consequence resulting from the common law having been thus ignored.—*Auth.*) The legislative authority must likewise, in all cases in which the constitution does not give the Supreme Court jurisdiction, declare what courts shall have jurisdiction; as all the other courts of the United States possess only such jurisdiction as is given to them by Congress:" Sergeant's Const. Law, p. 345.

34. This question seems to be settled, yet, as far as this treatise is concerned, there are incidental questions yet to be decided. It still remains necessary to consider, from another point of view, the extent to which the common law is applied by the United States national courts in determining what constitutes a crime. The difficult question, which has been examined, having been got out of the way, the answer is easy, and, in addition to being supported by all the decided cases, including the cases of Henfield and Williams, it has also the support of the great names of those who have contended for the more extended influence of the com-

mon law—Chancellor KENT, Judge STORY, Professor Du Ponceau, and Dr. Rawle; although they do not seem to have drawn, from the decided cases, the distinction within its proper limits.

35. "It is not true," says Mr. Spencer, *arguendo*, in *The People* v. *Vermilyea*, 7 Cowen 119, "that the common law is inapplicable to the criminal courts of the United States, farther than it respects their jurisdiction. When once legally possessed of the cause, they uniformly proceed according to the course of the common law, if not controlled by constitution or statute." And Judge CONKLING, in his treatise, before named,—"The national courts are unquestionably to look to the common law, in the absence of statutable provisions, *for rules to guide them*, in the exercise of their functions, in criminal as well as in civil cases:" Treatise on Jurisdiction, &c., 82.

36. The declaration of rights, providing, that, in all criminal prosecutions, the accused cannot be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land (§ 9), and the term "principles and usages of law," and other kindred expressions used by Congress in the judicial, and other acts, have been held to be, and undoubtedly are, a recognition of the existence of the common law as in force in the United States, as the means by which the jurisdiction derived by the United States courts from the constitution, or from Acts of Congress, is to be carried into effect: 1 Kent's Com. 336.

37. Kent asks,—"If the common law *be a rule of decision* in the exercise of the lawful jurisdiction of the Federal courts, why ought it not to apply to criminal as well as to civil cases, and upon the same principle, when jurisdiction is clearly vested?" Ibid. 341.

38. Clearly it ought. But the mistake made, is, in supposing that not only the rules and modes of procedure of the common law are to be looked to, but that, also, when the courts have jurisdiction over the person, place, or subject-matter, the common law has to be looked to, in the absence of statutory definitions or declarations, to ascertain crimes and to declare their punishment. Omitting this error, nothing can be more correct than Judge STORY'S argument in *United States* v. *Coolidge*, 1 Gall. 488; or, than Professor Du Ponceau's elaborate argument, in his treatise on the question.

39. Indeed, it is conceived, that, in no way can the law be

more correctly stated, as acted upon in all the cases, than by adopting Judge STORY'S view, in the case last cited, merely omitting those parts where he contends that "*the nature and extent*" of the authority given by Congress, must be regulated, not by the statute, but by the common law. Thus, it is not questioned in any of the cases that "when once an authority is lawfully given . . . . *the mode in which it shall be exercised* must be regulated by the common law:" Ibid.

40. The following extracts, from the same opinion, clearly and succinctly point out the full extent to which the common law is applied by the national courts of the United States in determining what are crimes:—"Whether the common law of England, in its broadest sense," says this able judge, "including equity and admiralty, as well as legal doctrines, be the common law of the United States or not, it can hardly be doubted, that the constitution and laws of the United States are predicated upon the existence of the common law. This has not, as I recollect, been denied by any person, who has maturely weighed the subject, and will abundantly appear upon the slightest examination. The constitution of the United States, for instance, provides that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' I suppose that no person can doubt, that for the explanation of these terms, and for the mode of conducting trials by jury, recourse must be had to the common law. So, the clause that 'the judicial power shall extend to all cases in law and equity arising under the constitution,' &c., is inexplicable, without reference to the common law:" Ibid. 489.

41. "Innumerable instances of a like nature may be adduced. I will mention but one more, and that is in the clause, providing, that the privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it. What is the writ of *habeas corpus*? What is the privilege which it grants? The common law, and that alone, furnishes the true answer. The existence, therefore, of the common law is not only supposed by the constitution, but is appealed to for the construction and interpretation of its powers."

42. Again,—"Congress has provided for the punishment of murder, manslaughter, and perjury, under certain circumstances, but it has nowhere defined these crimes. Yet, no doubt is ever

entertained on trials, that the explanation of them must be sought and exclusively governed by the common law; and, upon any other supposition, the judicial power of the United States would be left, in its exercise, to the mere arbitrary pleasure of the judges, to an uncontrollable and undefined discretion. Whatever may be the dread of the common law, I presume, that such a despotic power could hardly be deemed more desirable. . . . . The invariable usage of these courts has been, in all cases not governed by state laws, to regulate the pleadings (by) the common law. . . In criminal cases, the right of trial by jury is preserved, but the proceedings are not specifically regulated. The forms of the indictment and pleadings, the definition and extent of the crime, in some cases the right of challenge, and in all the admission and rejection of evidence, are left unprovided for. Upon what ground, then, do the courts apply, in such cases, the rules of the common law? I can perceive no correct ground, unless it be, that the legislature have constantly had in view the rules of the common law, and deemed their application *in casibus omissis* (to matters of proceedings, &c.—*Auth.*) peremptory upon the courts:" Ibid. 491–494.

43. All the difficulties arising out of this limited common-law influence, in connection with criminal cases, over the decisions of the national courts, have been pointed out by Story, Kent, and others, and are clearly admitted.

44. Even Judge CHASE, while contending in *The United States* v. *Worrall*, that the United States national courts have not "a common-law power over crimes," observed,—"Upon the whole it may be a defect in our political institutions; it may be an inconvenience in the administration of justice, that the common-law authority, relating to crimes and punishments, has not been conferred upon the government of the United States,—which is a government in other respects, also, of a limited jurisdiction,—but judges cannot remedy political imperfections, nor supply any legislative omission:" 2 Dallas 395.

45. In some of the cases already cited, the evil resulting from this limited common-law power of the national courts was very glaring. In one case the crime of manslaughter, committed on board a United States ship, passed without punishment; because, although Congress had provided for the punishment of murder, when so committed, it had omitted the necessary provision for

the punishment of the smaller offence, and the criminal passed unscathed. In another case, the crime of rape was allowed to pass unpunished, because it was committed by a consul, over whom, *ex officio*, the United States had exclusive jurisdiction, and Congress had made no statutory provision for such an offence, when committed by a person so situated.

46. These are difficulties which, as experience shows, are almost inseparable from confining criminal jurisdiction strictly to written codes. Such difficulties have rendered it necessary for the judges in one state, where they relied on a code, to fall back upon the principles of the common law, "in order to prevent the complete failure of justice."[1] In another state, where enormous labor has been expended on statutory provisions with a view to the perfection of a criminal code, they have still to resort to the old common-law principles, and precedents, and judicial expositions, in order to give their legislation its necessary effect.[2] And even in Louisiana, where they had prepared for them, by Mr. Livingston, one of the most highly-praised criminal codes that has ever been adopted by a state,[3] they seem to have been compelled to engraft upon their criminal laws, the all-pervading and controlling principles of the common law: Louisiana Rev. St. for 1856, p. 160.

47. In this connection (as the subject of the dissertation is closely allied to the question) a few remarks in reference to criminal codes, which some seem to think might be easily and safely made entirely to supersede the common law, may not be deemed out of place.

48. The following extracts from a letter, under date of 13th March 1826, to the author and compiler of the code above alluded to, which is generally known as the Louisianean Code, will be found of interest. "I believe," says Mr. Justice KENT, "I have heretofore declared against the annihilation of all constructive offences. This you have done at page 12, and I think it presupposes a perfect legislation, and much more perfect than I apprehend it to be in the power of any one or more individuals to make

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[1] Virginia. See *Commonwealth* v. *Adcock*, 8 Gratt. 661, 675; per THOMPSON, J.

[2] New York. See Pomeroy's Municipal Law (A. D. 1864), § 332.

[3] Mr. Livingston's code seems not to have been adopted in Louisiana. Their criminal code is founded upon the old civil law, and is modified by the common law; combining the excellencies of both: 1 Bish. Crim. Law, § 15, n. 4.

a code. I entertain the most thorough conviction that under a government that punishes nothing either of omission or commission, but what is within *the letter of a written law*, a great deal of fraud and villany, and abuse and offence, will escape unpunished. I will show precisely wherein I think your code is lamentably deficient in the attempt to bring an offence within the letter of the law. *It is impossible to define expressly and literally every offence that ought* to be punished; and if you ask me what is the evidence of its being an offence if not defined in the code, I answer, the laws of nature, of religion, of morality, which are written in the breast of every son and daughter of Adam, declare the offence:" 16 Am. Jurist 361.

49. The whole letter is a very able vindication of the common law, and the learned critic thinks that "our ancestors had as much wisdom and knowledge of human nature as we have, and that we ought to revere their maxims, and carry our reforming hand lightly and tremblingly over their works." From this very severe *critique* upon a much-praised code, the following representative passages are selected, as all for which room can be made:—

50. "You say that if an attorney being engaged and consulted on the merits, shall, on account of non-payment of fees, or for any other cause, appear for the opposite party, he is to be imprisoned, &c. You make this a public offence. He may have been consulted, and nothing material disclosed, and his client then refuses to pay and means to cheat or defraud him, and yet you inflexibly inflict imprisonment, and in your code there is *no pardon*, but for innocence detected and certain reformation. I think it is a great deal better and wiser to leave the government of attorneys to the discretion of the courts, so if he detains his client's papers when he has no lien, he is to be suspended, &c. Now your code admits of *no equity*. We must follow *the letter;* then suppose this attorney had notice of the claim of a third person to the papers, and he retains them until the right is settled by a bill of interpleader, must he still be punished, or may *the spirit* of the law, in this instance, be followed? I condemn the whole provision as dangerously severe, and it appears to me that the old English law is better and safer.

51. "I am entirely against the abolition of the common-law doctrine of contempts, and your substitute I humbly conceive to

be wholly inadequate. Your provision is that all contempts are to be the subject of indictment and trial by jury. Now I beg leave to say that the jury are wholly incompetent to judge of what is or is not decorous or insulting language to a court. If a judge was called a blockhead or a fool, one-half of the rude vulgar jurors of the country might think it a very smart and possil ly a very true saying. Besides, the remedy by indictment is *toc slow*. Must a judge sit and hear the contempt and wait six n onths before the trial in a criminal court can afford him redr«ss? Besides, you make no provision for insulting gestures, or looks, or actions. You say that if any person by *words*, or by making a *clamor or noise*, wilfully, &c., he may be removed and punished. So, if he use any indecorous, contemptuous, or insulting *expressions*, in the OPINION OF A JURY, he is to be punished. So, if he obstruct the proceedings of the court by violence or threats, he shall be fined, &c. Here is all the provision for contempts. All other contempts are abolished, and all these contempts must be tried on indictment, or information, in the usual form. Now I say you do not reach a thousand nameless, but gross and abominable contempts, that may be offered in court. The impudent or malicious offender can, Proteus-like, elude all your rattling chains, and insult with impunity. Insults to a court ought to be punished with the celerity of lightning, and here you wait the slow process of indictment for an open insult to the bench. I never would accept a judicial office under any government, if I was to be left so naked and defenceless as you in this chapter leave the Louisiana judges. It is by far the most exceptionable, the most distressingly exceptionable, part of the penal code:" Ibid. 366 *et seq.*

52. And of a still more celebrated code, the Code Napoléon, one of its compilers (M. Portalis) says,—"No matter how perfect a code may be, it is no sooner finished than a thousand questions present themselves. It would be a monstrous error to suppose, that a body of laws could be framed which would provide for all possible cases. So varied are the wants of society, so active the intercourse between men, and so extended their relations, that it is impossible for the legislator to provide for every emergency. The office of law is only to fix general maxims of right, to establish principles fruitful of consequences,