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 III.

(Concluded from the January Number.)

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1. If a satisfactory conclusion has been reached in reference to the vexed question which has now been considered, and which has given rise to such strongly-conflicting opinions, by jurists of the highest eminence and ability, the remaining question, where, with one or two narrow exceptions, the cases and opinions are in Vol. XV.—21
almost perfect accord, cannot be attended with much difficulty. It only remains now, then, to be ascertained from those cases and opinions, to what extent, in the different states of the Union, the common law is applied in determining what are crimes, and the nature and degree of punishment consequent thereupon.

2. A distinguished American jurist,\(^1\) in reply to a question put to him by the Commissioners on Administration of Justice in the West Indies, answers, in a few words, nearly the whole of the questions which are the subject of this part of the dissertation. He says: "In general it may be stated that the law of England, in its broadest sense, including the system of common law and equity, is the foundation of our jurisprudence. Except such parts of the common law and statute law as never were applicable to our local circumstances and condition, or such as have become inconsistent with the nature of our government since the Revolution, it is everywhere regarded as the rule in cases not provided for by our own positive institutions. The state of Louisiana forms an exception to what has been said;" London Jurist for 1828, p. 434.

3. The state of Ohio may also be considered an exceptional state, as regards the adoption of the criminal portion of the common law: Key v. Vattier, 1 Ohio 60; Van Valkenburg v. The State, 10 Ohio 404. In this respect, Ohio may be considered in the same position as the national courts; adopting the forms, rules of evidence, and general modes of procedure of the common law, but depending upon statutory enactments for the enumeration of crimes, and the declaration of punishments. Louisiana, as has been seen (supra, p. 2, § 46,\(^2\)), has adopted the common law, by statute, to supply the deficiencies of their criminal code.

4. It may, therefore, with the exceptions above named, be laid down as a general proposition, that, in all the states of the Union, the common law of England has been adopted in its fullest extent, so far as it is adapted to the circumstances of this country, and so far as it has not been modified or abrogated by statute. To this effect are authorities infinite in number.\(^3\)

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\(^1\) Mr. Wheaton.

\(^2\) And see Du Ponceau on Juris. 75–82; Parsons v. Bedford, 3 Peters S. C. 433, 449.

\(^3\) See 1 Bish. Cr. Law, p. 15, n. 4, citing statutes and cases in full detail in reference to the different states.
5. The common law of England, so adopted, consists not only of that common law, in its English sense, but, as has been observed in the first part of this treatise (Part 1, § 15), of the English statutes passed in amendment of it previous to the settlement of this country, and of other acts subsequently passed that were specially adopted, so far as the same were suited to the circumstances of this country.¹

6. To undertake, in the limits of this article, to point out the particular circumstances that have been held to have modified the common law, upon its adoption here, and the manner in which it has been subsequently affected by the legislation of the different states, would be entirely impracticable. To show the manner in which some half-dozen states alone have, in some respects, made by their legislation, particular provision for the definition and punishment of acts that were crimes at common law, takes up nearly the whole of the second volume of Mr. Wharton’s elaborate treatise on criminal law. The general principle, as stated in the last paragraph, seems all that is necessary to be here particularly referred to in the matter.

7. It may be said, generally, that all offences that were felonies at common law, have been made the subject of specific legislation in all the states, and that while, in most of the states, the definition of the particular offence, as murder, manslaughter, burglary, arson, larceny, &c., has been left as at common law,² and is subject to a common-law indictment, the subject is particularly regulated and pointed out by statute: 1 Bish. Cr. L. 621. It is a question of little practical importance, however it may be theoretically,³ as to what might have been the case in reference to those higher offences, if they had been committed before the legislature of the particular state had specifically provided by statute for their punishment. The reason of the thing is, that in

¹ See the following cases, among others: Comm. v. Chapman, 13 Met. 68; State v. Robbins, 6 N. H. 550; Comm. v. Leach, 1 Mass. 59; Republic v. Dour, 1 Dallas 86; McAleis v. Hayne, 3 Brev. 299; State v. Hodgden, 3 Vt. 485; United States v. Worrall, 2 Dallas 394; State v. Owen, 1 Murphy 452; Comm. v. Webster, 5 Cash. 305; State v. Danforth, 3 Conn. 112.
² State v. Chandler, 2 Harring. (Del.) 554; United States v. Smith, 4 Cranch C. C. 637; Comm. v. Call, 21 Pick. 510; Trial of Peter York, 7 Law R. 515; Wright v. The State, 9 Yerger 342; Comm. v. Daley, 4 Pa. Law J. 155; Armor v. The State, 3 Humph. 385; Comm. v. Chapman, 13 Met. 68.
³ See Du Ponceau’s Treatise on Jurisd. as to this question.
a state where the common law is held to be in force as far as adapted to the state of the country where not changed by statute, the common-law crimes that were subsequently made punishable with death by statute, would have previously been held to have been so punishable at common law. In California, before there were opportunities for specific legislation, or even for the organization of government itself, a common law was recognised and enforced under the severest penalties (1 Bish. Cr. L. 7), and there were numerous cases where the penalty of death was summarily inflicted for murder, and for other aggravated offences. Such, there can scarcely be a doubt, must generally have been the case in the early settlement of this country, although there have not been any judicial records preserved of those very early proceedings.

8. In one very early case it was held that prior to the permanent establishment of a government in this country, at the time of the Revolution of 1776, though no express provision had been at any time made for defining what should be treason against such temporary bodies, yet that treason is an offence against common law, and that allegiance being due from the 28th of November, 1776, when the legislature was convened and the members of the council were appointed, treason, which is nothing more than a criminal attempt to destroy the existence of a government, might certainly have been committed before the different qualities of the crime were defined, and its punishment provided for and declared by a positive law: Jacobs v. Adams, 1 Dall. 56, 57.

There are technical difficulties against the principle laid down in this case, being sustained, which would not apply if the offence committed had, for instance, been murder or arson. In a still earlier case than the one last named, before the state of Pennsylvania had apparently passed an act providing or declaring any specific punishment for murder, such an offence was held punishable with death at common law: Pennsylvania v. Bell, Add. Rep. 156.

9. But, however correct these cases may be on principle, they involve questions not liable very often to come up again; and the only really practical class of crimes now punishable at common law, is composed of misdemeanors, such as malicious mis-

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1 As murder, burglary, arson, &c., were: 1 Ch. Cr. L. 705; 1 Bish. Cr. L. 622.
2 For definition of crimes which include misdemeanors, see 4 Blk. Com. 5. And see New York Rev. St. (1859), Vol. 3, p. 990, § 43.
chief; breaches of the peace and acts tending thereto: acts tending to shock or injure the morals of the community, and other analogous offences, which, at common law, are punishable with fine and imprisonment: 2 Russ. on Cr. (1st Am. ed.) 1381. The remainder of this part will be devoted to cases of these descriptions.

10. The following from the "Gazette," a newspaper published in Portland, Me., April 8th 1799, from the observations of Mr. Chief Justice Dana, prior to passing sentence (Comm. v. Adams, 16 Am. Jur. 109, s. c. Thacher's Cr. Cas. 459 n.) for the publication of a false, scandalous, and mischievous libel against the legislature of the commonwealth, will be found of interest, from the early period in which the case was decided, as well as from its applicability to this question. Not only is the applicability of the common law to crimes and punishments shown in this case, but the way in which the degree of punishment is to be regulated, viz. to be determined by the judges, governed by principles of reason, and influenced by precedents in previous similar or analogous cases, restrained besides only by the principle of article 8th of the amendments to the constitution prohibiting the infliction of excessive fines and of cruel and unusual punishments,—is, also, partially to be found in it.

11. The Chief Justice says: "However censurable the libel may be in itself, it cannot be more dangerous to the public tranquillity than the propagation of the principles which have been advanced by the counsel in defence, that, the indictment being grounded, not on any statute, but the common law of England only, ought not to be supported, as that law had no force or operation within the United States; that the common law was inconsistent with those republican principles contemplated and avowed in our constitution, and inapplicable to the genius and nature of our government. Such doctrines were unheard of among us till of late. Those who have urged them would deprive us of what we have long been taught to cherish as our birth-right and best inheritance. Indeed, without the aid of the common law, every lawyer must know it would be impracticable to proceed in the distribution of justice, civil or criminal. So sensible were the citizens of the United States of the truth of this observation, that,

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1 See Comm. v. Chapman, 13 Met. 68; State v. Burnham, 9 N. H. 78; State v. Avery, 7 Conn. 270; Hodges v. The State, 5 Humph. 114.
when forming their constitutions, they carefully, in almost all of them, secured its operation, so far as their local condition admitted, unless repugnant to their constitutions." This is then shown by extracts from the constitutions of a number of the states, after which the Chief Justice observes: "Thus it is beyond all question, that the citizens of America have anxiously secured to themselves the full operation of the common law of England, so far as it is applicable to our local condition, and not repugnant to their respective constitutions. Let every one now judge how unfounded are the novel, disorganizing doctrines that the common law of England, under the restrictions stated as above, has no force or operation within the United States,—that it is inconsistent with those republican principles contemplated and avowed in our constitution, and inapplicable to the genius and nature of our government. If our constitution were silent respecting the common law of England, yet I might challenge the soundest lawyer to show how he could carry into effect that constitution, or many of our acts made under it, without a recurrence to the common law. We have, for example, a statute against treason, by which it is enacted that a citizen of this state, who shall levy war against it, shall be deemed guilty of that offence: but to find what facts may amount to that levying of war, we must resort to the law of England, from which the expressions are borrowed. We have acts against murder and burglary; but those terms are technical, the acts in which they are used do not define them, and we go to the common-law decisions for their legal import." In passing sentence, the court say: "The court has considered every circumstance of alleviation which relates to you (the defendant), not forgetting your poor state of health, and in the sentence which the clerk is now to read, we have aimed at giving judgment in mercy."

12. In the plethora of material on hand, all that can be attempted to be done is merely to give representative cases. Numerous other cases than the following might be cited establishing like principles. In Tennessee, it was held (Grisham v. The State, 2 Yerger 595), that, as the common law is the guardian of the morals of the people, acts or conduct notoriously against public decency and good manners constitute an offence at common law, and punishable as such. In Vermont, it was held (State v. Briggs, 1 Aiken 230), that the wounding and
torturing a living animal, not only with force and arms, but with wicked and malicious motives and intentions, was a misdemeanor to be punished by the judges, at common law. In Alabama (*State v. Cawood*, 2 Stew. 360), the court, after laying down the principle that the common law, so far as applicable, is the rule of action in the state, both in civil and criminal proceedings where not affected by statute, and that therefore conspiracies are indictable offences; and, that, where no specific punishment is declared by statute, and the old common-law punishment is taken away, the ordinary common-law punishment, for misdemeanor, to which no other punishment is assigned, of fine and imprisonment, will be inflicted, go on to say: "This doctrine, in the case of a common scold, underwent a very able discussion in the Supreme Court of Pennsylvania, a few years ago, in which Judge Duncan delivered a very able opinion, deciding that though the ducking-stool could no longer be used, fine and imprisonment might be substituted. And, we believe, in the celebrated case of *The United States v. Ann Royal*, under the influence of the common law, the defendant was punished with fine and imprisonment." In reference to the punishment, at common law, it is worthy of notice, as something remarkable, that, in the case of *The United States v. Worrall*, 2 Dallas 384, after the judges (Chase and Peters) had differed as to the common-law jurisdiction of the national courts, they still went on and inflicted upon the defendant the common-law punishment of fine and imprisonment.

14. At the Supreme Judicial Court in the county of Suffolk, Mass., February Term 1803, Abel Boynton and four other persons were convicted at common law of a conspiracy to cheat and defraud by false pretences. They were sentenced to sit in the pillory and to be imprisoned in the common gaol. Pierpont and another were also tried at the same term of the same court for a conspiracy at common law to defraud underwriters, and were also sentenced to the pillory and to imprisonment in the common gaol. The former old common-law punishment has now become obsolete.

15. Driving a carriage through a crowded or populous street, at such a rate or in such a manner as to endanger the safety of

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1 See *supra*, p. 2, § 13.
3 See, as to this punishment, *post*, § 35.
the inhabitants, has been held (United States v. Hart, 1 Peters C. C. 390) an indictable offense at common law, and amounting to a breach of the peace.

16. In North Carolina it was held (State v. Huntley, 3 Iredell 418) that the offense of riding or going armed with unusual or dangerous weapons so as to naturally terrify and alarm a peaceful people, is an offense at common law. The court said: "If these acts be deemed by the common law crimes and misdemeanors which are in violation of the public rights and of the duties owing to the community in its social capacity, it is difficult to imagine any which more unequivocally deserve to be so considered, than the acts charged upon this defendant. They attack directly that public order and sense of security which it is one of the first objects of the common law to preserve inviolate."

17. It has been seen (supra, § 15), that a conspiracy to cheat and defraud is punishable at common law. So, also, have a great variety of other conspiracies been likewise held indictable: Curnnl v. Foering, 6 Pa. Law J. 281; Comm. v. Sylvester, Id. 283, s. c. Brightly 331; State v. Younger, 1 Dev. 357; Comm. v. Dupuy, Brightly 44; Comm. v. Foering, Id. 315; Lambert v. The People, 7 Cow. 166; Comm. v. Judd, 2 Mass. 388; Comm. v. Tibbets, Id. 536; Comm. v. Woods, 7 Law R. 60. In one of these, it was especially objected that the offence charged was a crime unknown to the law of the state, but it was held, that, although the offence was not a statutory one, yet that it was an offence at common law, and punishable as such. The court said: "The nature of the offence for which the prisoner was held to bail shows it to have been held indictable. Though there is, perhaps, no case exactly in point, we do not hesitate to pronounce it criminal:" Rhoades v. The Comm., 15 Penn. St. R. 277.

18. So cheating of various kinds has been held indictable at common law: Republic v. Sweers, 1 Dallas 45; Republic v. Powell, Id. 47; State v. Patillo, 4 Hawks 348. In the first of these cases it was held, that "if a cheat is prejudicial, that is, of such a nature as may prejudice," an indictment at common law will well lie. The old common-law punishment of pillory was inflicted in this case, in addition to the present common-law punishment, for such offences, of fine and imprisonment.

19. It has previously been noticed (supra, p. 1, § 23) that in England many offences are punishable in the ecclesiastical courts
that are here punishable by force of the common law. In England, not only is Christianity established by law, but to enforce its moral code, the ecclesiastical courts are provided with a special power over such offences. In this country, Christianity, as a spiritual system, is not established by law, but as a moral and economical system, it is, and to enforce it in this relation, all the economical and moral jurisdiction of the ecclesiastical tribunals of England have been borrowed and worked into the common-law courts of this country: 2 Whart. Cr. L., § 2545. In one case (Updegraph v. The Comm., 11 S. & R. 400), the court says: "Christianity, general Christianity, is, and always has been, a part of our common law, and maliciously to vilify the Christian religion is an indictable offence. For atheism, blasphemy, and reviling the Christian religion, there have been instances of prosecution (State v. Chandler, 2 Harring. 554; The People v. Ruggles, 8 Johns. 290) at the common law, but bare non-conformity is no sin by the common law." It has also been held (Comm. v. Dupuy, Brightly 44), that where three or more persons agree to go to a church where divine service is to be performed, and to laugh and talk during the performance of the same, in a manner which might be excusable in a tavern; and, in so doing, manifest a determination to resist by force any effort that may be made to remove them, or prevent their doing so, they will be guilty of riot at common law: United States v. Brooks, 4 Cranch C. C. 427.

20. Offences against the marital relation, which are also in England only cognisable in the ecclesiastical courts,¹ and which involve, in fact, the whole class of offences against chastity, have been held indictable in this country at common law, even when unaccompanied by force.² In England, they would not be so held, unless amounting to a public nuisance.

21. The publication of obscene writings or prints, gross and public lewdness, indecent public exposure of the person, common houses of prostitution (Comm. v. Harrington, 3 Pick. 26), and even the frequenting of such houses, have been adjudged to be offences at common law, as acts tending to destroy the public

¹ 2 Whart. Cr. L. 2545; Grishaw v. The State, 2 Yerger 595; State v. Graham, 3 Sneed 134. And see supra, p. 1, § 23 and n.
² See 2 Whart. Cr. L. §§ 2545, 2648-2651, and cases cited. But see, contra, 1 Bish. Cr. L. § 46.
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morals: *United States v. Brooks*, 4 Cranch C. C. 427; *Comm. v. Sharpless*, 2 S. & R. 91; *Barker v. The Comm.*, 7 Harris (Pa. St. R.) 413; *Bell v. The State*, 1 Swan 45; *State v. Moor*, Id. 136; *State v. Dowd*, 7 Conn. 384; *Britain v. The State*, 3 Humph. 203. In one of these cases, in which it was held that the utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable at common law, the court, after pointing out the well-established principles of the common law applicable to the case, say: "These adjudications (which have been decided without the aid of any statutory enactment), we think, furnish analogies sufficiently strong to sustain the present prosecution. But were there no analogy to be drawn from any decided case, we hold, that, upon the broad principles of the common law, which we have stated, this prosecution is most amply sustained. Thus fortified by sound principles—principles which lie at the foundation of every well-regulated community, and resting on a basis so immutable, we are the more indifferent as to precedents exactly in point. The gist of this offence is the gross violation of good morals and public decency, and for which, according to the argument, there is no precedent to be found; and, if required for the first time to make one, as we hesitate not to do, we must be guided by principles, sensible and practicable in themselves:" *Bell v. The State*, 1 Swan 45. So, profane swearing in public, is, in this country, indictable as a nuisance (*State v. Kirby*, 1 Murphey 254; *State v. Graham*, 3 Sneed 134); and it has also been held, that though private drunkenness is not an indictable offence, drunkenness becomes an offence when it is open and exposed to public view to that extent that it becomes a nuisance, *commune nocentum*: *Smith v. The State*, 1 Humph. 398; *State v. Waller*, 3 Murphey 229.

22. There has been another class of cases peculiar to this country, viz.: those connected with slavery, where the principles of the common law have been applied so as to meet and punish various offences for which no statutory provision had been made: *State v. Hardin*, 2 Dev. & B. 412. Thus, it was held in Tennessee, that if a master cause and permit his slaves to pass about in public view, indecently naked, he is guilty of lewdness, and indictable therefor at common law: *Britain v. The State*, 3 Humph. 203.

23. In a case in North Carolina, in holding that an unjustifiable
battery committed on another's slave was indictable, the court said: "As there is no positive law decisive of the question, a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result which is best adapted to general experience." Upon the application of these principles, it was decided, that, although a slave was "not protected by the general criminal law of the state, still, he was within the protection of the common law:" State v. Hale, 2 Hawks 582. It has also been held, that to cruelly, inhumanly, and maliciously cut, slash, beat, and ill-treat one's own slave is an indictable offence at common law (United States v. Brockett, 2 Cranch C. C. 441); and, in another case, that the owner of a slave who beats him cruelly, and exposes him, so beaten, to public view, is guilty of a misdemeanor at common law; and he was, accordingly, punished with a fine: United States v. Lloyd, 4 Cranch C. C. 470. So, in another very interesting case, it was contended, that, as slavery was unknown to the common law, killing a slave could not be murder at common law; but this was not sustained, the court holding that a law of paramount obligation to the statute law was violated by the offence—the common law, founded upon the law of nature, and confirmed by revelation: State v. Reed, 2 Hawks 454.1

24. There are some other cases to which the penetrating influence of the common law has been applied, altogether peculiar to this country. Thus, it has been held that raising a liberty pole in 1794, amounting to symptoms of dissatisfaction with government, and tending to promote ill-feelings, is an offence at common law: Penna. v. Morrison, Addison's R. 274. And for tearing down an advertisement, in case of a sale under a public law, for a public use, is an offence at common law, and indictable for the public injury: Penna. v. Gillespie, Id. 267. And on the principle that where a statute gives a privilege, any violation of such privilege will be punished by the common law, it was held, in Massachusetts, that illegally voting more than once for the choice of selectmen was indictable and punishable at common law: Comm. v. Silsbee, 9 Mass. 417.

25. Another large class of cases which, as has been seen

1 And see, to same effect, State v. Samuel, 2 Dev. & B. 184.
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(supra, p. 1, § 24), has been provided for in England by a lengthy series of statutes, has generally been left in this country to be acted upon by the common law. This class comprises cases of malicious mischief, which are very numerous and varied. In one of these cases, which was an indictment at common law, for maliciously killing a horse,1 the attorney-general contended that every act of a public evil example, and against good morals, is an offence indictable at common law, and punishable without a statute, even though the offence charged were an unprecedented one. The court, in sustaining this view and the indictment, say:

"It seems to be agreed that whatever amounts to a public wrong may be made the subject of indictment. The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, and many other offences, have heretofore been held indictable. Breaking windows by throwing stones at them, though a sufficient number of persons were not engaged to render it a riot, and the embezzlement of public moneys, have likewise been deemed public wrongs, and have been held indictable at common law:" Repub. v. Teischer, 1 Dall. 337.

26. Among the numerous acts that have been held indictable as malicious mischief, are, maliciously killing a cow, The People v. Smith, 5 Cowen 258, or a steer: The State v. Scott, 2 Dev. & B. 35: maliciously poisoning cattle: Comm. v. Leach, 1 Mass. 59; maliciously burning a large number of barrels of tar: State v. Simpson, 2 Hawks 460; and generally that malicious mischief to property is a misdemeanor at common law, and may be punished criminally: Bump v. Betts, 19 Wend. 420. In another case the court, in rendering judgment, say: "This is an indictment for destroying an ornamental tree on public ground. For the commonwealth it was contended that it was a maxim in the law that there was no injury without a remedy, and this being a public loss and injury, nothing but an indictment would lie; that it is the malicious intent that constitutes the crime, and that every act of a public evil example, and against good morals, is indictable at common law." The court sustained the indictment, and sentenced the defendant to pay a fine and costs: Comm. v. Echert, 2 P. A. Browne's R. 250.

27. A great variety of acts have been held indictable at common law, as acts of a public evil example, or acts such as to

1 See, also, State v. Council, 1 Overton 305.
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amount to a public nuisance, or such as would work an injury to the community. In one of these cases the court enunciate the following principle: “In the absence of positive acts of the legislature,” say the court, “we know of no rule or criterion by which an act can be ascertained to be criminal but that of its being against the interest of the state. The act must have the necessary ingredient of possibility of injuring the community, or an individual of that community, in a manner which the good of the whole requires to be repressed. Apart from this consideration, it is not for courts to inquire how the act stands in a moral or religious point of view:” State v. Dodd, 3 Murphey 228. Within the range of this class of cases, it has been held to be an indictable offence at common law to be guilty of public cruelty to a cow in or near a public street in Washington as a public nuisance: United States v. Jackson, 4 Cranch’s C. C. 483. So, for the same reason, keeping a pig-sty in Philadelphia (Comm. v. Van Sickle, Brightly 69), or near a public road in a thickly settled rural district (Comm. v. Kutz, Id. 75 n.), have been held to be, per se, indictable offences at common law. Placing a stall for selling fruit, &c., on the footway of a public street, although the owner pay rent to the owner of the adjoining premises (Comm. v. Wentworth, Id. 318), obstructing a highway (Kelly v. The Comm., 11 S. & R. 345); building a stone wall in a highway so as to amount to an obstruction (State v. Smith, 7 Conn. 428); constables obstructing the street by selling goods, taken under execution, at public auction, even though required by a statute to dispose of them at public sale (Comm. v. Miliman, 13 S. & R. 405); erecting a dam in a navigable river, which is a highway (Comm. v. Church, 1 Barr 105), have all been held indictable as nuisances at common law. So, as it is a principle of social, natural, and municipal law, that each individual shall so use his own property as not to injure the public health; in a case where, by a special act, a mill-dam was allowed to be built, it was held that, notwithstanding this, when the mill-dam became a nuisance and injurious to public health, it was indictable at common law: State v. Gainer, 3 Humph. 39. So, the keeping of a common gaming-house has been held indictable as a public nuisance, because of the necessary injury to the morals of the community resulting from such an establishment: State v. Mathews, 2 Dev. & B. 426. And, as an offence against common decency, casting
a dead body into a river, without the rites of Christian sepulture, has been also held indictable at common law: *Kanavan's Case*, 1 Greenl. 226. In all of these cases, wherever the punishment is named, it is either a fine at common law or imprisonment; and, where the place of imprisonment is named, the common gaol.

28. Another class of acts, closely allied to the above, and which are also made punishable by the common law, consists of acts which are injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society. In one case—in which the court say that it is impossible to find precedents for all offences, and that "the malicious ingenuity of mankind is constantly producing new inventions in the act of disturbing their neighbors. To this invention must be opposed general principles calculated to meet and punish them"—it was held that going secretly into a house after night and making "a great noise," so as to frighten a married woman and cause her miscarriage, was indictable at common law: *Comm. v. Taylor*, 5 Binn. 279. In another case, in which the court say that, by the provisions of the constitution, the common law still retains its character as the common preserver of the peace of the land, and that it punishes as public offences against man, acts tending to create a breach of the public peace, and to endanger the public safety, they add: "He who disinters the dead and exposes the corpse to the public gaze; he who appears naked in the streets of a populous town, as Sir Charles Sedley did in London; every one who outrages decency so far as to incite others to a breach of the peace, is indictable at common law, although his conduct should actually inflict personal violence on no one:" *State v. Chandler*, 2 Harring. 554. In this class of cases it has been held indictable in this country to challenge another to fight with fists (*Comm. v. Whitehead*, 2 Law R. 148); to challenge another to fight a duel, even though the duel is to be fought in another state (*State v. Warner*, 1 Hawks 492), and even expressing a readiness to fight with deadly weapons, as tending to provoke such a combat, has been held indictable at common law: *Comm. v. Tibbs*, 1 Dana (Ky.) 524. A great variety of other acts have also, on the same ground, been held indictable; as the erection and exhibition of a "stuffed paddy" (*Comm. v. Haines*, 6 Pa. Law J. 239), (an image of St. Patrick); counselling to commit offences of a high and
aggravated character, such as are considered *mala in se* (Comm. v. Willard, 22 Pick. 478); persuading, instigating, or inciting another to commit a breach of the peace (United States v. Lyles, 4 Cranch's C. C. 469), or inciting others to insurrection, riot, and tumult: United States v. Fenwick, Id. 675. In all of these cases, too, where the punishment is named, it is either fine or imprisonment.

29. There are also various acts against, or tending to defeat, public justice, which are indictable at common law. Thus, it has been held that the escape from prison of a person, lawfully imprisoned for a breach of the peace, without breaking the prison or committing any other actual violence, is, at common law, an offence against public justice, and punishable with fine and imprisonment: State v. Doud, 7 Conn. 384. On the same ground, the persuading a witness not to attend a public prosecution on the part of the state has been held indictable (State v. Keyes, 8 Vt. 67); and the separation of a jury, without permission of the court, before rendering their verdict, has been repeatedly held to be a misdemeanor, for which the jurors may be punished at common law: Cannon v. The State, 3 Texas 35; Wright v. Burchfield, 3 Ohio 52; Brown v. McConnell, 1 Bibb 265. So, it has been held in New York, that, whenever justices of the peace act partially or oppressively, from a malicious or corrupt motive, they may be punished criminally: The People v. Coon, 15 Wend. 278. Discharging an offender without requiring sufficient sureties, when it is done with the intent to pervert the course of law and justice, is clearly an offence at common law: Ibid. It has also been held, that, when a public law imposes a public duty upon a single person, or a number of persons, the omission to perform the duty is sufficient to justify an indictment at common law: State v. Williams, 12 Iredell 177. To detain a writ, for the purpose and with the intention of preventing the course of public justice, is an offence at common law, and an indictment will well lie therefor: State v. Lovett, 3 Vt. 118.

30. A great variety of other acts have been held indictable by force of the common law. In Tennessee, where exclusive cognizance had been given to the county courts, of all indictments for assault and battery, it was held, that, by the common law, the Supreme Court, possessing a general jurisdiction, had cognizance of assault and battery with intent to kill, for which an indictment
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was sustained, notwithstanding the statute, and the defendant was sentenced to be punished with fine and imprisonment: State v. Anderson, 2 Overton 6. Eaves-dropping, has also been held indictable: Comm. v. Lovatt, 6 Pa. Law J. 226; State v. Williams, 2 Overton 108. In the latter of these cases cited, it was contended that as there was no statute on the subject, and no precedent could be found in the state, the indictment was bad, but the court replied: "Agreeably to the common law such an indictment well lies, and nothing can be seen in this part of it which is inconsistent with our situation, or, in fact, with the situation of any society whatever." And the indictment was held good. Knowingly selling unwholesome provisions is a misdemeanor at common law: State v. Norton, 2 Iredell 41. So is the mixing of poisonous ingredients in food or drink designed for any individual, whether done through malice, or a design of gain: State v. Buckman, 8 N. H. 205. On this ground it was held, that, where an individual had thrown the carcase of an animal into a well, which tainted and corrupted the water used by a family, an indictment would be sustained, as charging an offence at common law: Ibid. Assault, and false imprisonment, and kidnapping, have been held indictable at common law, when there was no statute relating thereto: Chick v. The State, 3 Texas 285; State v. Rollins, 8 N. H. 550. So have forgery (State v. Walker, N. C. T. R. (Taylor's R.) 229; Comm. v. Chandler, 2 Law R. 122); uttering bank-notes with the intent to deceive and defraud (Comm. v. Boynton, 2 Mass. 77); and extortion, where there has been the receipt of money, or of some thing of value: Comm. v. Cony, 2 Mass. 523. It was also held, in Connecticut, that a battery, with intent to kill, is, by the common law in force in the state, a high crime and misdemeanor, but that imprisonment for life cannot be inflicted at common law, as it is contrary to the principles thereof, being both indefinite and unreasonable: State v. Danforth, 3 Conn. 112. Forcible entry into a dwelling-house has also been held indictable at common law, although there was a statute in force providing for restitution; the statute still leaving the parties, the one to his action for damages; the other to his liability to be indicted and punished at common law: Harding's Case, 1 Greenl. 22, 27. And, in Vermont, Mr. Justice Redfield, in deciding that an indictment at common law lies for an assault, and resisting one in the execution of any legal autho-
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rity or power, even though provision has been made by statute for a higher penalty, says: "As the statute has only superadded the higher penalty for the offence, this does not take away the right to proceed against the offender for the offence at common law, which can only be punished with fine and imprisonment in the common gaol." State v. Downer, 8 Vt. 429.

31. There is only room for one or two more such instances, which must close the list of this description of cases. Thus, it has been held that the production of abortion or miscarriage is an offence at common law (Comm. v. Demain, Brightly 441); and, in Massachusetts, under an indictment for rape on a child under ten years of age, which was insufficient under the statute, the court passed sentence as for a misdemeanor at common law, thereby sustaining the indictment at common law, which had proved insufficient under the statute: Comm. v. Lanigan, 2 Law R. 49. In an extremely interesting case, which was decided in the infancy of this country (A. D. 1788), where the defendant was sentenced to fine and imprisonment for contempt of court, the power of the common law is very conspicuously displayed. The question having been subsequently taken before the legislature, the judges, and the power of the common law, against the most intense opposition, were triumphantly sustained: Repub. v. Oswald, 1 Dallas 319. There is no room here for the fuller exposition of the important principles developed in this case.

32. A few, of an entirely different description of cases, may be given, where the further power of the common law is manifested. Thus, it has been decided, on common-law authorities, that, if a servant lodging in the same house, unlatches the door of his master's bed-room, with intent to kill him, it is burglary: United States v. Bowen, 4 Cranch C. C. 604. But that it is not burglary, at common law, to break the door of a store, situate within three feet of the dwelling, and enclosed in the same yard: State v. Langford, 1 Dev. 253. In State v. Gibson, 10 Iredell 216, the court, in justifying the return of a blow in self-defence, say: "Our sturdy ancestors who built up the common law did not require a man to turn and flee when he received a blow. He is allowed to return blow for blow, provided he does not give an excessive blow, not called for by the occasion;" and, this, they put not exclusively on the ground of self-defence, but, because it tends to prevent a repetition of the act. And, according to the
old principles of the common law, animals that are ferocious in nature are not the subject of larceny (Comm. v. Chace, 9 Pick. 15); and, on the same old principles, an indictment for horse-stealing will not lie where there has been no trespass in the original taking: State v. Braden, 2 Overton 69; Felter v. The State, 9 Yerger 404. In the last of these two cases cited, the court say: "The rule laid down by Coke and Hale, Hawkins and Blackstone, that there must be a taking invito domino, and that there can be no felony without a trespass, is a plain rule, comprehensive by every capacity, and, in its nature, not easy to be misunderstood; it leaves no latitude to the judge, nor any to the jury." In Pennsylvania, it has been held, that the destruction of a child, in gremio matris, is murder at common law, and said, citing Bracton and numerous later authorities, that the distinction taken in Massachusetts as to quickness, is recognised nowhere else: Comm. v. Demain, 6 Pa. Law J. 29. And, in Tennessee (Cash v. The State, 2 Overton 199), it has been decided, on common-law authority, that to make a man guilty of an affray, it is not essential that the fighting took place with the assent of both parties. It is because the violence is committed in a public place, and to the terror of the people, that the crime is called an affray, and not an assault and battery. And, on similar authority, it has been held that if death happens beyond a year and a day, after a wound is given, the law presumes that the death happens from some other cause than the wound: State v. Orrell, 1 Dev. 141. By the common law it is felony for a man who elopes with another's wife, to take the husband's goods, though with the consent and at the solicitation of the wife (The People v. Schuyler, 6 Cowen 572); and, on common-law authorities, false swearing by a witness in reply to a question asked him for the purpose of impairing his testimony, is perjury: State v. Street, 1 Murphey 124. Again, "In conformity to the principles of the common law," held, in North Carolina, that an accomplice is a competent witness for the prosecution, on the trial of his associate (State v. Wier, 1 Dev. 363); and, "in accordance with the well-established doctrine of the common law," held, in

1 See 1 Hale's P. C., c. 13, p. 510, § 5.
2 See 1 Hawks P. C., tit. Assault, Battery, and Affray.
3 2 Co. Inst. 218; and see supra, p. 1, § 28.
4 See 1 Hawks P. C. 323.
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Tennessee, that where a defendant, in an indictment for homicide or felonious assault, relies upon the plea of self-defence, by reason of his fears of death or great bodily harm from his antagonist, he must show by proof that his fears were based on reasonable grounds: Morgan v. The State, 3 Sneed 475. In New York, it was held, that, as their statute is but confirmatory of the common law, the common-law doctrine of autrefois acquit obtains there: The People v. Saunders, 4 Parker 199. Various questions connected with evidence (Hill's Case, 2 Gratt. 607), trials by jury (State v. Ben, 1 Hawks 436; State v. Curtis, 5 Humph. 608), justices of the peace (State v. Ellar, 1 Dev. 267; State v. Barrow, 3 Murphey 122), accessories (Comm. v. Knapp, 9 Pick. 513; State v. Jernagan, N. C. T. R. (Taylor's R.) 49), infants (Comm. v. McKeagy, 1 Ash. 256; State v. Le Blanc, 3 Brev. 399), insanity (Carter v. The State, 12 Texas 500), drunkenness (United States v. Drew, 5 Mason 28), and a great variety of other matters, where the full influence of the principles of the common law is brought to bear, have to pass without particular notice, but are all included in the general principles laid down in previous parts of this dissertation. It may be well to state, that, in matters of crime, so general is the influence of the common law, every offence for which a party is indicted is supposed to be prosecuted, as an offence at common law, unless the prosecutor, by reference to a statute, shows that he means to proceed upon the statute; and, without such express reference, if it be no offence at common law, the court will not look to see if it be an offence at all: Peas' Case, 2 Gratt. 636. And, as has been seen (supra, p. 3, § 24), and as is also shown, in a case of assault and battery, in Massachusetts, so great is the expansive power of the common law, that, in entirely new cases, the principles of the common law will open and take them in: Comm. v. Power, 7 Met. 596.

33. A few words further may be necessary in reference to the nature and degree of punishment consequent upon the commission of crimes at common law. It has been before noticed (supra, p. 3, § 7) that all the crimes that were punishable, capitally, at common law, have been provided for by statute; and it has also been seen that as the pillory, the ducking-stool, &c., are now obsolete, the only common-law punishments that remain practi-
cally here are fine and imprisonment,¹ where no punishment is otherwise provided by statute. It has also been seen that the punishment must be a reasonable one; that is, duly proportioned to the greater or less aggravated nature of the case; the judges having, by common law, the right of exercising a reasonable discretion in the matter: 4 Blk. Com. 378–380; 1 Bish. Cr. L. §§ 626, 628.

34. In The United States v. Coolidge, 1 Gallison 494,¹ Story, J., says: “It is a settled principle that where an offence exists, to which no specific punishment is affixed by statute, it is punishable by fine and imprisonment. This is so invariably true, that in all cases where the legislature prohibit any act without annexing any punishment, the common law considers it an indictable offence, and attaches to the breach the penalty of fine and imprisonment:” Com. Dig. Indict. D.; 8 Co. 60 b.; 2 Co. Inst. 131.

35. And again, to the same effect: “When any act is prohibited to be done by statute, and no punishment is prescribed, the court may inflict a common-law punishment. All offences which exist at common law, and have not been regulated by statute, are within the discretion of the court to punish, and the common-law punishments are fine and imprisonment:” 2 Swift’s Dig. 417 (pillory, &c., now obsolete generally); Du Ponceau’s Treat. of Jurisd.; Lewis v. The Comm., 2 S. & R. 551; 1 Bish. Cr. L. § 628. As all offences at common law to which were attached a heavier punishment have been regulated by statute, the above authorities are undoubtedly correct—so limited.

36. In decisions on the degree of punishment, the discretion of the court is to be exercised on the circumstances of the case: State v. Kearney, 1 Hawks 55. In a case in Pennsylvania, Duncan, J., in discussing the question as to whether involuntary manslaughter is to be considered a misdemeanor, punishable with fine and imprisonment, or a felony, punishable by infamous infliction, discusses the question as to the discretion of the judges in punishment. “Discretionary punishment as to its quantum, in cases of misdemeanor, is wisely vested in the courts; the degrees of guilt and the shades and colors of the offences are so various. Misdemeanor is punished by fine and imprisonment, at the discretion of the court, exercised on a just consideration of all the

¹ Supra; and see 6 Dane’s Ab. 719.
² See, also, 1 Kent Com. 317.