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NEW JERSEY
Court of Errors and Appeals.

State of New Jersey,
Plaintiff-Appellant,
vs.
Peter J. Rodgers,
Defendant-Appellee.

Brief for Plaintiff-Appellant.

STATEMENT OF FACTS.

This case was a prosecution commenced in the Recorder's Court of the City of Paterson against the Defendant-Appellee. The complaint (Case, page 8) charges that the defendant did operate a certain automobile over and upon a public street, to wit, over and upon a public street of said city, known as Market Street, "while he, the said Peter J. Rodgers, was under the influence of intoxicating liquor, contrary to and in violation of the first section of an act of the Legislature of the State of New Jersey entitled "Supplement to an act entitled 'An act concerning disorderly persons (Revision of 1898),' approved March 12, 1913 (P. L. 1913, p. 103), and by reason thereof the said Peter J. Rodgers became a disorderly person."

The defendant-appellee was convicted in the Recorder's Court and sentenced to imprisonment in the County Jail for thirty days. He reviewed this conviction by certiorari.

The judgment of the Recorder's Court was reversed by the Supreme Court upon the ground that the statute was invalid because it provided for a conviction of the offense therein described without indictment and trial by jury. This decision was based by the Supreme Court upon the ground that the evidence in the case at bar, a statement of which was contained in the conviction in the Recorder's Court and returned with the writ (Case, pages 9 to 15), showed that the defendant was guilty of the offense of common law nuisance; that this offense was not triable in the Recorder's Court, and hence that the Recorder was without jurisdiction.

The opinion of the Supreme Court is printed on pages 16 to 18 of the Case.

The evidence showed, as stated in the opinion of Mr. Justice Swayze in the Supreme Court, that the defendant drove his automobile, which was a large machine, upon Market Street in the City of Paterson at the time named in the complaint; that the defendant at that time was very much under the influence of intoxicating liquor; that the car was driven by him through the front window of a saloon located on Market Street, breaking the glass.

The grounds of appeal appear on pages 1 and 2 of the Case, and are based solely upon the finding of the Supreme Court that the Recorder's Court was without jurisdiction to hear and determine the charge made against the defendant.

ARGUMENT.

I.

IF THE SUPPLEMENT OF 1913 DESCRIBES AN OFFENSE WHICH IS DISORDERLY CONDUCT AND NOT A COMMON LAW OFFENSE, THE LEGISLATURE HAD POWER TO PROVIDE FOR THE PUNISHMENT WITHOUT INDICTMENT AND TRIAL BY JURY.

This apparently is conceded by the opinion of the Supreme Court. See *State* v. *Anderson*, 40 *N. J. L.* 224; *State, Shivers, Prosecutor*, v. *Newton*, 45 *N. J. L.* 469; *Carter Bros.* v. *Camden District Court*, 49 *N. J. L.* 600; *Minard* v. *Dover*, 47 *Vr.* 132; *State* v. *Lakewood Market Company*, 84 *N. J. L.* 512, 523. See, also, *Bassette* v. *State*, 51 *N. J. L.* 502, in which the Supreme Court held that the defendant was not entitled to a trial by jury under the Disorderly Persons' Act.

The practice of trying cases involving disorderly conduct before a magistrate, without a jury, antedates the adoption of the Constitution. The earliest act on this subject which has been found was passed June 10, 1799, and appears in the Revision of 1847, page 564. This act was revised and amplified in 1875 (Revision of 1877, p. 303), and was again revised and further extended in 1898 (2 Comp. Stat., p. 1296). It covers numerous minor offenses, which, from the earliest times in this State, have been punished either by fine or imprisonment, upon summary conviction before a magistrate. An examination of these offenses will show that many of them are not substantially different from the offense described in the Supplement of 1913.

II.

THE DEFENDANT WAS NOT CHARGED WITH BEING A COMMON LAW NUISANCE OR WITH ANY OTHER COMMON LAW OFFENSE, BUT WITH A MERE VIOLATION OF THE SUPPLEMENT OF 1913 TO THE DISORDERLY PERSONS' ACT.

The decision of the Supreme Court, as we understand it, is based upon the finding that the defendant was guilty of a common law nuisance; that, therefore, the Recorder's Court was without jurisdiction to try him, under the doctrine of *State* v. *Anderson,* 40 *N. J. L.* 224, and *Atlantic City* v. *Rollins,* 76 *N. J. L.* 254.

In *State* v. *Anderson,* two indictments were found against the defendant, one for selling liquor without a license, the other for keeping a disorderly house by frequently selling therein liquor, contrary to law. Prior to the commission of these alleged offenses, an act had been passed providing that where ordinances of cities provided for the punishment of the unlicensed sale of spirituous liquors, the provision for the punishment of such offense by indictment should not apply. This statute also provided that where an ordinance provided for the punishment for the offense of keeping a disorderly house, it should not be lawful to prosecute for such offense by indictment if the alleged offense consisted only of the continuous or frequent sale of liquor without a license.

The Court held that the provision of the statute which prohibited prosecution by indictment for the offense of selling liquor without a license was valid, as that was a mere statutory offense, but that the statutory provision which prohibited prosecution by indictment for the offense of keeping a disorderly house and attempted to substitute in its place prosecution under a city ordinance for such offense was invalid because the offense

of keeping a disorderly house was a common law offense, and could not be prosecuted except by indictment and trial by jury. *Atlantic City* v. *Rollins, supra,* follows the doctrine of *State* v. *Anderson* without discussion.

The distinguishing feature, however, between *State* v. *Anderson* and the case at bar is that in *State* v. *Anderson* the statutory provision which was declared to be unconstitutional directly and distinctly provided for the prosecution of a common law offense without indictment and trial by jury. In the prosecution, therefore, under a city ordinance, contemplated by this statute, the defendant must necessarily be charged in the complaint with a common law offense, which would differ in no respect, so far as the charge was concerned, from the common law offense of keeping a disorderly house.

It seems to be conceded by the opinion of the Supreme Court that the complaint in the case at bar did not charge a common law offense. The Supreme Court was not able to say, *from a reading of the complaint,* that any attempt was made to convict the defendant of a common law offense. This appears plainly from the following extract from the opinion of the Court:

> "The recognized line of distinction is between offenses indictable at common law and offenses created by statute. In the present case the statute is applicable to cases of both classes. One who operates an automobile or motor vehicle while under the influence of intoxicating liquor is almost sure to be guilty of a public nuisance, although it is conceivable that the vehicle might be of so low a power and weight and operated at so slow a speed that it could not be properly found to be a nuisance. On the other hand, one who operates (to use the word of the statute) an ox-cart while under the influence of intoxicating liquors would be within

> the words of the statute, but could hardly be called guilty of a public nuisance. Since the statute applies to offenses that may not be a crime at common law, as well as offenses that may be, we must look to the facts of the case to determine whether the present proceeding is an attempt to convict Rodgers of a crime without an indictment by a grand jury, as required by the Constitution, or whether it is an attempt to convict him merely of disorderly conduct, which may properly be done by summary proceedings before a magistrate."

This is a concession upon the part of the Supreme Court, that if the defendant were convicted merely of the offense with which he was charged, he would not be convicted of a common law offense, because the charge did not contain a statement of the facts and circumstances, which, if proved, would render the defendant guilty of such an offense.

These facts and circumstances are gathered by the Court from the evidence which was produced in this case. The defendant, however, could not possibly be convicted in this case of an offense which was not charged in the complaint. When it is conceded that the charge in the complaint is not a charge of a common law offense, it must necessarily follow that the conviction was not a conviction of a common law offense. The question as to what the defendant actually did is entirely immaterial. He may have been guilty of the facts alleged in the complaint and of something else beside, which something else, either by itself or in connection with the facts alleged in the complaint, may have made him guilty of a common law offense in the same way that a person charged with a single sale of intoxicating liquor may in fact have been guilty of such numerous and habitual sales as to have made him guilty of keeping a disorderly house. If the charge in the complaint were of making a single sale of intoxi-

cating liquor, he could by no possibility in such a proceeding have been convicted of the offense of keeping a disorderly house, no matter what the evidence in the case may have shown.

That the Supreme Court believed that the charge in this complaint did not necessarily show a common law offense is also apparent from the opinion of the Supreme Court in *Curtis* v. *Joyce,* argued and decided at the same term. That was a prosecution under the same statute, and the charge was identical.

The defendant in that case, who was the plaintiff in certiorari, had originally assigned among the reasons for reversal that the defendant was deprived of the right of trial by jury, but prior to the argument had withdrawn that reason.

Speaking of this, the Court said:

> "This question is similar to that discussed in the Rodgers case, just decided, and it would be interesting to consider whether the same rule would apply to a case where the only proof was that the defendant drove an automobile on the public street while he was under the influence of intoxicating liquor. We are precluded from dealing with this question, as the prosecution has abandoned his eighth reason."

If the charge in the complaint did not show, as it appears to be conceded that it did not show, the commission of a common law offense, and if, as must be the case, the defendant, therefore, could not in this proceeding have been convicted of a common law offense, it is insisted that the evidence in the case, admitted to sustain the charge in the complaint, could by no means change the character of the offense with which the defendant was charged from a mere statutory offense into a common law nuisance. The character of the offense is determined not by the evidence which may be legally *admissible* to support the complaint, but by the charge and the evidence which is *requisite to sustain* the charge.

In the case at bar the charge would have been sustained by proof that the defendant drove an automobile, without detailed specifications as to the kind of automobile, on Market Street, while under the influence of liquor. The evidence as to the manner of his driving, as to the result of his driving, as to the extent of his intoxication, was all admissible, as cumulative evidence of the charge made. It was not, however, essential evidence for the purpose of sustaining the charge.

The question of the jurisdiction of the Recorder's Court over the subject matter of the case depends not upon the evidence produced, but upon the offense with which the defendant is charged. This is the doctrine of *State* v. *Anderson.* It is also the doctrine of *Geiger* v. *Recorder,* 96 *Atl.* 1006. In that case the defendant was convicted before the Recorder's Court of being a disorderly person. The judgment of the Court was that the defendant was "guilty of interfering with complainant while he was lawfully upon Coit Street, in the Town of Irvington," and of being a disorderly person under section 3 of an act concerning disorderly persons.

The Supreme Court said, in a *per curiam* opinion:

> "Section 3 of the act makes one a disorderly person who interferes with or obstructs another while lawfully on a street, but the evidence *and complaint* (italics ours) clearly show that if the defendant was guilty of any offense it was that of assault and battery, and not merely an interferer or obstructor. To permit this conviction to stand would allow a recorder to reduce the crime of assault and battery to that of disorderly conduct."

An investigation of the files in the office of the Clerk of the Supreme Court shows that the complaint in the Geiger case charged that one Herman Geiger, of the City of Newark, "did interfere with said complainant who was lawfully upon said Coit Street *and did beat said complainant upon the face and body.*" (Italics ours.)

The Geiger case is, therefore, entirely consistent with the principle for which appellant is contending. The action of the Court was based upon the fact that the complaint showed the common law offense of assault and battery and the evidence sustained the complaint.

See, also, *State* v. *Gratz*, 86 *N. J. L.* 484.

III.

The Statutory Offense of Driving an Automobile While Under the Influence of Intoxicating Liquor Is Not a Common Law Nuisance.

Various definitions of "common law nuisance" have been given by the courts and the writers of textbooks. In *Bishop's Criminal Law*, § 1072, it is defined as follows:

> "A public or common nuisance is any act or neglect the product of which works an annoyance or injury to the entire community; or, the product itself is termed a nuisance."

In *Russell on Crimes, page* 1838 (*Vol.* 2), is the following:

> "Nuisance is distinct from trespass and negligence, and, as a general rule, in cases of public nuisance the grievance lies in the inconvenience in fact caused and not in the intent or knowledge of the person responsible as occupier of the premises on which the nuisance is created, or of the owner, if the premises are in fact unoccupied."

> "A common nuisance may be defined to be an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects or by neglecting to do a thing which the common good requires." *Hawk. Pl. Cr., Vol.* 1, *p.* 360.

> "Whatever openly outrages decency or is injurious to public morals or public health or comfort is a common nuisance and a misdemeanor at common law." *Wharton Cr. L., p.* 1840, § 1676.

> "It is a common nuisance to prevent the public from having the free use of the highway by unreasonably blocking it or otherwise temporarily excluding them from it, or by putting on it any permanent structures, or by placing in its vicinity instruments which make its use insecure or uncomfortable." *Wharton Cr. L.*, § 1751.

From these definitions it will be seen that the essence of the crime of public nuisance is inconvenience or annoyance to the public. *If there is no annoyance or inconvenience to the public there is no nuisance.*

An indictment for public nuisance must set out the manner in which this inconvenience or annoyance arises. See *Morris & Essex R. R. Co.* v. *State,* 36 *N. J. L.* 553 (bottom of page 555); *State* v. *Middlesex & Som. Tr. Co.,* 67 *N. J. L.* 14; *State* v. *Asphalt Paving Co.,* 53 *A. Rep.* 299; *People* v. *Sands,* 1 *Johns.* (*N. Y.*) 78; *Commonwealth* v. *Linn,* 158 *Pa. St.* 22; 22 L. R. *A.* 353.

The statutory offense of driving an automobile while under the influence of intoxicating liquor differs from the offense of common law nuisance because when the thing prohibited by the statute has been done the offense is complete whether any annoyance, inconvenience or danger results to the public or not.

It is not essential to the existence of the offense that the driver of an automobile should be so intoxicated that he cannot safely drive a car.

The word "intoxicated" was defined, and that definition approved, by the Supreme Court of Pennsylvania in *Elkin* v. *Buschner* (*Pa.*), 16 *Atl.* 102, 104, as follows:

> "Whenever a man is under the influence of intoxicating liquor so as not to be entirely at himself, he is intoxicated; although he can walk straight, although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be at himself, so as to be excited from it, and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated."

In *Babbitt on Law Applied to Motor Vehicles,* the following appears, *page* 341, *sec.* 466:

> "The weight of opinion and the inherent evidence appearing in the sweeping character of the language of the section as a whole, lead to the presumption that the expression 'under the influence of intoxicating liquor,' as used in the motor vehicle act, is to be taken not only to cover all the well known and easily recognized conditions and degrees of intoxication, but to reach back of even slight intoxication, and include any abnormal mental or physical condition which may arise in the operator of a motor vehicle as the result of indulging in any degree, or at all, in any of those things described as intoxicating liquors, as tending to deprive him of that clearness of intellect and control of himself which he would otherwise possess."

It is a well-known fact that persons somewhat under the influence of liquor, and therefore within the statutory prohibition, can and do drive automobiles without substantially endangering public safety. Such a driver of a motor vehicle may drive his car with ordinary skill and care, the car may be one of low power and may be driven at an exceedingly low rate of speed; the driver may, in operating the car, obey every provision of the traffic laws and of the Motor Vehicle Act;

he may not endanger anyone else who may be upon the public highway; his driving may be of such a character that no one upon a public street would notice his abnormal condition, and yet, if he is even slightly under the influence of intoxicating liquor he has committed the statutory offense. Such a driver would certainly not be guilty of common law nuisance. His act would not work an annoyance or inconvenience to the public, and, independently of the statute, he would be guilty of no offense.

As has above been pointed out, the Supreme Court in its opinion recognizes this fact, and concedes that in order to bring the offense within the common law definition of public nuisance, facts not charged in the complaint and not within the statutory definition of the offense must be shown. In other words, it must appear that the safety of the public was endangered to a considerable degree by the driving. This may be shown by proof of the fact that the degree of intoxication of the driver was such as to render him incapable of properly driving the machine; that he drove it in such a manner as to endanger those using the public highways; that the life and limb of the public in general were actually endangered. None of these particulars are elements of the statutory offense—the statutory offense is complete without them—but the offense of common law nuisance has not been committed unless some of these or like elements are present.

In the statutory offense the fact that the driver is under the influence of intoxicating liquor is of the essence of the offense.

In the offense of common law nuisance in the use of an automobile upon the highway, the essence of the offense is the harm, inconvenience or danger to the public from the improper use of the highway. The fact that the driver may or may not have been under the influence of intoxicating liquor is but incidental, and is not of the essence of the offense.

It clearly appears, therefore, that the offense of common law nuisance arising from the use of an automobile upon the highway, and the statutory offense of driving an automobile on the highway while under the influence of intoxicating liquor, are distinct and separate offenses, even though they arise out of the identical transaction. It will thus be clearly seen that the statutory offense of driving an automobile while under the influence of intoxicating liquor, and the common law offense of nuisance in the use of an automobile upon the highway, are essentially different offenses; that they each require different kinds of proof to sustain them, and that, although they arose from the same transaction, they still would be distinct and separate offenses.

Authorities giving principles applied in determining identity of offenses.

Cases which have arisen under various constitutional provisions prohibiting the trial of an accused person after acquittal for the same offense are in point as indicating the rule which has guided the courts in the determination of the question as to the identity of offenses.

In *King* v. *Vandercomb, 2 Leach Crown Cases, p* 829, the following language appears in the opinion:

> "And if crimes are so distinct that evidence of one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law to say that they are so far the same that an acquittal of the one shall be a bar to the prosecution of the other."

In this case the accused had been acquitted of burglariously entering a house and larceny. They were subsequently indicted for burglariously entering a house with intent to steal based upon the same act. The plea of former acquittal was set aside. See, also, *Lohman* v. *People,* 1 *N. Y.* 379; 49 *Am. Dec.* 340; *Arrington* v. *Commonwealth,* 10 *L. R. A.* 242. This latter case was a prosecution for sale of liquor without a license.

A former conviction had been had for sale of liquor on Sunday, based on the same sale. It was held that the sale of liquor on Sunday was not the same offense as the sale without a license, although but one sale had been made, because each offense required different evidence to sustain it. The Court said, in part:

> "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes, and if each statute requires proof of an additional act which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

See, also, *Ruble* v. *State,* 51 *Ark.* 170; *Commonwealth* v. *Shea,* 80 *Mass.* 387, in which it was held that the conviction of the offense of keeping a tenement used for the sale of intoxicating liquor was not barred by a conviction for keeping a shop open on the Sabbath, even though both charges were based on the same act.

In *Wharton's Criminal Law, sec.* 393, the following appears:

> "The fact that there has been a former conviction or acquittal on a trial for an offense of a different grade, in connection with and growing out of the same act or set of facts, cannot be set up as a bar on a subsequent trial charging an offense, the essential elements of which are not the same. Thus a conviction for assault and battery will be no bar to a trial for manslaughter where the injury results in death after the former conviction."

> "Test as to whether two indictments are for the same offense is the fact whether evidence necessary to support the latter indictment would have sustained a conviction under the former indictment. Testimony to sustain the second

charge not being admissible to sustain the first charge, there is not former jeopardy." *Wh. Cr. L.* 528.

In *United States* v. *Harminson*, 26 *Fed. Cases No.* 15308, the rule is stated as follows:

> "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

See, also, *Morey* v. *Commonwealth*, 108 *Mass.* 433; *State* v. *Elder*, 65 *Ind.* 282; *Commonwealth* v. *Roby*, 12 *Pick.* 496.

In *United States* v. *McAndrews and Forbes Co.*, 149 *Fed.* 836, the defendants were indicted under the Sherman Act for combination and for monopoly. They were convicted on both counts and sentenced to separate punishment on each count. Motion was made in arrest of judgment upon the ground that the counts of the indictment charged substantially the same offense.

The Court said, in part, as follows:

> "The true test of the correctness of the defendants' position is whether upon a review of both the facts and the law identity exists between the offenses proved in this case and called in the first, combination, and in the third monopoly. If identity does exist, a conviction under either count would be a bar to a prosecution on the other, and therefore a bar to punishment on both. The rule regarding identity of offenses is to discover whether the crimes under consideration are in substance precisely the same or of the same nature or species, or the one crime is an ingredient of the other. In this case

> the crimes of monopoly and combination are legally distinct. The offense under the first count was complete when the combination was actually formed with intent to bring about restraint of interstate commerce. The additional overt acts were but cumulative evidence from which the true intent, purpose and continuance of the combination might be inferred. But they were themselves the proof of the monopoly, and the monopoly existed in their aggregate effect. That the prosecution in overwhelmingly proving the existence and intent and continuance of the combination proved the monopoly does not in my opinion render the offenses identical merely because all the evidence offered was applicable to both counts."

This case was appealed to the Supreme Court, but the appeal was dismissed by consent of counsel for plaintiff in error. 212 *U. S.* 585.

See, also, *Commonwealth* v. *Vaughn* (*Ky. Ct. of Appeals*), 45 *L. R. A.* 858, and cases cited in note; *State* v. *Cooper,* 13 *N. J. L.* 362; *State* v. *McCormick,* 9 *N. J. L. J.* 152, and cases cited.

It seems to be established by the cases above cited that the test of identity of offenses for the purpose of determining whether or not conviction of one offense will bar conviction of another offense growing out of the same conduct or transaction is whether or not the evidence requisite to establish either offense is sufficient to establish the other. If the evidence requisite for proving either offense will not prove the other, the crimes are distinct and separate, and conviction or acquittal of one will not bar conviction of the other.

Tested by this rule, the offense of driving an automobile upon a highway in such a manner as to create a common law nuisance is distinct from the offense of driving an automobile upon a highway while under the influence of intoxicating liquor. The first offense requires proof

of the unlawful use of an automobile upon the public highway in such a manner as to inconvenience the public. Whether or not the person charged with the offense was intoxicated at the time of its commission is immaterial. The gravamen of the offense is the harm and inconvenience and danger to the public. If that is proven the offense is established.

The second offense is established by proving that the person charged drove an automobile on the public highway while under the influence of intoxicating liquors. Proof of the manner of the defendant's driving or the harm, inconvenience or annoyance caused the public by such driving is entirely immaterial except in connection with evidence of intoxication and as tending to support such evidence. The statutory offense would certainly not be supported by mere proof of reckless, careless driving in a public street, thereby occasioning great harm, inconvenience and annoyance to the public; there must, in addition to this proof, if such proof is offered, be proof that the defendant was under the influence of intoxicating liquor.

On the other hand, the common law offense would not be sustained merely by proof of defendant's driving while under the influence of intoxicating liquor unless proof were offered showing driving in such a manner as to produce harm, inconvenience and annoyance to the public.

Under the doctrine of these cases, therefore, it seems plain that conviction of the statutory offense will not bar subsequent conviction of the common law offense or vice versa. The offenses are so distinct and separate that although both arise out of the same conduct or transaction separate convictions can be had for both. In this respect the offenses are identical in principle with *Commonwealth* v. *Shea*, 80 *Mass.*, 387, *supra*; *Arrington* v. *Commonwealth*, 10 *L. R. A.* 242, *supra*, and *United States* v. *McAndrews and Forbes Co.*, 149 *Fed.* 836, *supra*.

IV.

It Was Competent for the Prosecutor to Make Complaint Against the Defendant Charging any Offense Which He Had Committed, Although the Offense Charged May Have Been an Ingredient in a More Serious Offense.

The Supreme Court, in its opinion, says that the defendant was guilty of a common law nuisance; that it could not have been the intention of the Legislature to reduce a common law nuisance to a mere offense against the Disorderly Persons' Act; that the defendant cannot be convicted of a common law nuisance without indictment and trial by jury, and, therefore, his rights were infringed by the proceeding in question. It is apparent, however, that this is not a statement of the true situation. As above stated, the defendant was not charged with a common law nuisance; he was charged with an offense different and distinct from common law nuisance. If the offense with which he was charged was an ingredient in the offense of common law nuisance that does not exempt him from liability for punishment for the offense charged.

In 1 *Bish. Cr. L.*, § 791, the rule is stated as follows:

> "Subject to whatever exception may be found in the doctrine of merger discussed in the last chapter a criminal person may be holden for any crime of whatever nature which can be legally carved out of his act. He is not to elect, but the prosecuting power is. If the evidence shows him to be guilty of a higher offense than he stands indicted for, or of a lower, or of one differing in nature, whether under a statute or at the common law, he cannot be heard to complain, the question being whether it shows him to be guilty of the one charged."

See, also, *Regina* v. *White*, 9 *Car. & P.* 282; *State* v. *Jesse*, 3 *Dev. & Bat.* (*N. C.*) 98; *Regina* v. *Neale*, 1 *Car. & K.* 591; *Lohman* v. *People*, 1 *N. Y.* 379; *Thayer* v. *Boyle*, 30 *Me.* 475; *Rex.* v. *Davis*, 1 *Car. & P.* 306; *State* v. *Archer*, 54 *N. H.* 465.

There seems to be no question that this is the rule. If, therefore, it be admitted that the defendant was not charged with the offense of common law nuisance—that he was charged with a lesser offense—that the evidence showed him to be guilty of the lesser offense with which he was charged, but also showed him to be guilty of the greater offense of common law nuisance, it necessarily follows that his rights were not infringed by the conviction of the lesser offense, whether or not that conviction would operate as a bar to a subsequent prosecution for the higher offense.

CONCLUSION.

The statute under consideration is a most important one for the protection of the public. *The question really involved in this case is whether this statute can or can not be enforced against drivers of motor vehicles.*

The opinion of the Supreme Court if affirmed makes it practically impossible to ever enforce this statute in a magistrate's court against the driver of a motor vehicle. It announces the novel rule that under this statute a court cannot determine by an inspection of the complaint whether or not it has jurisdiction of a cause, that on the papers in the case jurisdiction may appear, but that when the evidence is in, the magistrate's duty is not confined to the determination of the question as to whether or not the evidence shows the defendant to be guilty of the offense charged, but he must also decide the exceedingly difficult question as to whether or not the evidence, in addition to showing the defendant guilty of the offense charged, shows him to be guilty of some other offense, viz., that of a nuisance at com-

mon law. Under this decision the magistrate, after having heard the case, of which, as appears from the complaint and warrant, he has jurisdiction, and after having found as a fact that the defendant did the things which the complaint charges him with doing, must dismiss the complaint if he finds that in addition to doing the things charged in the complaint the defendant did other things not charged or referred to in the complaint, but which make him guilty of a common law nuisance.

No precedent is cited which supports this unusual rule; no case is referred to which expresses the same view of the jurisdiction of a magistrate. The cases cited in the opinion of the Supreme Court, in which it is stated that "the driver may be liable to conviction as well for manslaughter, *State* v. *Campbell,* 82 *Conn.* 671; *People* v. *Darragh,* 126 *N. Y. Supp.* 522; or for reckless driving, *Commonwealth* v. *Horsfall,* 213 *Mass.* 232; or for assault and battery, *State* v. *Schutte,* 87 *N. J. L.* 15, are by no means in point.

Commonwealth v. *Horsfall,* referred to in the opinion, was a conviction of a *statutory offense* of recklessly driving and knowingly failing to inform a person who had been injured and has no application to the principle under discussion in this case.

State v. *Schutte* was a conviction of the common law offense of assault and battery by driving an automobile at a reckless rate of speed on a much-traveled public road, in such a manner as to inflict bodily injuries on another.

If the defendant, while under the influence of intoxicating liquor, instead of driving his machine through the window of a saloon had struck a person in the road because of his reckless driving, he might have been liable to indictment for assault and battery under the doctrine of *State* v. *Schutte.* It could scarcely be contended, however, that his liability to conviction of assault and battery would relieve him from prosecution for the statutory violation, as the two offenses are so

different in character that they could not be said to be identical under any of the rules applied for the purpose of determining identity of offenses.

The enforcement of this statute is important. If travel on our roads is to be protected, it is of the utmost importance that drivers of automobiles should know that they are liable to prosecution if they drive when intoxicated, whether or not any accident is caused or whether or not their driving is of such a character as to make them a public nuisance. The strict enforcement of this law will tend to keep the intoxicated motor vehicle driver from the road and thus make travel safe, while adherence to the doctrine of the decision of the Supreme Court will make it practically impossible to reach the intoxicated driver of an automobile unless he conducts himself in such a manner as to make him a public nuisance, and then only after indictment by a grand jury and trial by a petit jury.

It is respectfully submitted that the judgment of the Supreme Court should be reversed, and that the judgment of the Recorder's Court of the City of Paterson should be affirmed.

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,
Plaintiff-Appellant,

vs.

PETER J. RODGERS,
Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT.

The facts in this case are accurately stated at pages 1 and 2 of the appellant's brief, and under the rules should not be repeated here.

THE ARGUMENT.

POINT I.

The Supreme Court correctly reversed the judgment of the Recorder of the City of Paterson for the reasons (slightly modified) stated in the opinion of Mr. Justice Swayze filed in the cause (pp. 16 to 18).

We might perhaps be content to rely upon the reasoning contained in Mr. Justice SWAYZE'S opin-

ion in support of respondent's position were it not for what we deem to be a misapprehension on the part of the Attorney General's office as to the true meaning of that opinion.

The opinion reads—"Peter J. Rodgers was convicted by the Recorder of being a disorderly person under Chapter 67 of the Laws of 1913 (P. L. 103). The act provides that any person who operates an automobile, motor or any other vehicle over any public street or highway while under the influence of intoxicating liquors shall, upon conviction, be punished by an imprisonment of not less than thirty days and not more than six months. The act is one of an increasing class of acts, whereby the Legislature seeks to punish offenses by summary proceedings, evidently with a design of avoiding trial by jury. That this can be accomplished in a certain class of cases is settled. *Howe* v. *Treasurer of Plainfield,* 37 *N. J. L.,* 145; *Riley* v. *Trenton,* 51 *N. J. L.,* 498. That it cannot be accomplished in another class of cases is also settled. *State* v. *Anderson,* 40 *N. J. L.,* 224; *Atlantic City* v. *Rollins,* 76 *N. J. L.,* 254. The recognized line of distinction is between offenses indictable by common law and offenses created by statute. In the present case the statute is applicable to cases of both classes. One who operates an automobile or motor vehicle while under the influence of intoxicating liquor is almost sure to be guilty of a public nuisance, although it is conceivable that the vehicle might be of so low a power and weight, and operated at so slow a speed, that it could not be properly found to be a nuisance. On the other hand, one who operates (to use the word of the statute) an ox-cart while under the influence of intoxicating liquors would be within the words of the statute, but could hardly be called guilty of a public nuisance. Since the

statute applies to offenses that may not be a crime at common law, as well as offenses that may be, we must look to the facts of the case to determine *whether the present proceeding is an attempt to convict Rodgers of a crime* (italics ours) without an indictment by a grand jury, as required by the Constitution, or whether it is an attempt to convict him merely of disorderly conduct, which may properly be done by summary proceedings before a Magistrate. This question is not to be determined by the mere language of the statute. The Legislature cannot, for instance, deprive a man of the constitutional safeguard when he is charged with larceny by authorizing his prosecution and imprisonment under the disorderly act for a statutory conversion or a statutory stealing * * *. The question of a man's constitutional rights cannot be made to depend on a mere matter of nomenclature. We must look at the real case that is presented."

The misapprehension, to which we refer, as to the meaning of this language—and perhaps the language is sufficiently inaccurate as to warrantably give rise to that misapprehension—is to conclude that the learned Court intended to say, or to have it understood, that since the statute might include among those who offended against it, parties whose offenses in offending against it amounted to common law nuisances, to wit, crimes indictable by the common law, we must look to the facts of the case to determine whether the present proceeding is an attempt to convict Rodgers of a crime—*as a crime and punishable as a crime*—without an indictment by a grand jury, as required by the Constitution, or whether it is an attempt to convict him merely of disorderly conduct.

Manifestly, the learned Justice meant no such thing as that, because, as the Attorney-General says, the defendant was not charged with committing a common law nuisance or with any other common law offense, but with a mere violation of the Supplement of 1913 to the Disorderly Persons Act—and, of course, under such a charge, the defendant could not be convicted of a common law indictable crime.

What the opinion really meant to convey, we respectfully submit, was that since the statute might include, among those who offended against it, parties whose offenses in offending against it amounted to common law nuisances, to wit, crimes indictable by the common law, we must look to the facts of the case to determine whether the present proceeding is an attempt to convict Rodgers *of a crime* (his act, in fact, amounting to a crime) under the guise of convicting him merely of disorderly conduct, or whether it was an attempt to convict Rodgers merely of disorderly conduct, *that being in fact his only offense.*

So interpreted, the opinion is entirely in accord with the authorities.

While *Howe* v. *Treasurer,* 37 *N. J. L.,* page 146, distinctly holds that the same act may constitute an offense both against the State and municipal corporation, and that both may punish without violation of any constitutional principle, nevertheless, as pointed out by Mr. Justice SWAYZE, both *Riley* v. *Trenton,* 51 *N. J. L.,* 498, and *State* v. *Anderson,* 40 *N. J. L.,* 224, state as the exception to this general rule *"offenses indictable at common law."* In the former case—*Riley* v. *Trenton*—Mr. Justice

GARRISON, in referring to the case of *Howe* v. *Plainfield,* 37 *N. J. L.,* 145 (q. v.), said:

> "The doctrine there established is that certain acts which are indictable as offenses against the state, may also be, by the legislature, constituted *offenses against the police regulations of municipalities, so as to subject the offender to the mode of trial incident to proceedings for the violation of ordinances,* and that in such cases, if the legislature has not made special provision for a trial by jury, it cannot be demanded as a matter of right. This case * * * must be considered as settling the issue against the contention of the prosecutor, *the present case not being within the exception as to offenses indictable at common law.*"

What then is the doctrine as decided in that case to which "offenses indictable at common law" are the exception? Clearly, the doctrine so established was not that certain acts indictable as offenses against the State might be tried *as crimes* by a police justice without indictment or trial by jury. The doctrine so established was that certain acts which were indictable as offenses against the State (by reason of some statute law) might also be, by the Legislature, constituted offenses against the police regulations of municipalities so as to subject the offender to the *mode of trial incident to proceedings for the violation of ordinances.*

So in the case at bar—if it should be assumed that Rodgers was not guilty of an indictable *common law* offense when he operated his automobile over the public streets, while under the influence of intoxicating liquor, *Riley* v. *Trenton, supra,* is

authority for the proposition that the Legislature had a perfect right to constitute his offense a violation of the Disorderly Persons Act, and to subject him to the mode of trial incident to a proceeding of that kind before a Magistrate. But—*per contra*—if Rodgers *was* guilty of committing a common nuisance, *an offense indictable at common law,* when he operated his automobile over the public street while under the influence of intoxicating liquor, then *Riley* v. *Trenton* is authority for the proposition that the Legislature could not deprive him of his right to be indicted before trial and to a trial by jury by constituting his offense a mere violation of the Disorderly Persons Act so as to subject him to the mode of trial incident to such proceedings.

In determining the jurisdiction of a Justice of the Peace or Recorder to try by way of summary proceedings a party as a disorderly person—whose disorderly act constituted at the common law the indictable offense of being a common nuisance, *it is no argument in favor of that jurisdiction* that the punishment to be inflicted by the Recorder or Justice may be only trivial. It is not the amount of the punishment that counts or has any relevancy to the subject of the inquiry. It is the consideration that it would be unconstitutional to subject the defendant to the shame and disgrace of *having his offense inquired into* (as Rodgers' was in the case at bar) except in the authorized method, after indictment, and by jury trial.

We quote from *State* v. *Anderson, supra,* as follows:

> Per Beasley, *C. J.*:
>
> "The keeping of a disorderly house is a crime indictable at common law, and in this

state it is punishable by fine and imprisonment in the state prison. Therefore, it is clear that if this offense can, for the purpose of crimination, trial and punishment, be put into the hands of these municipal authorities, it follows that all common law offenses of the same grade can be, in like manner, so deposited. This, I think, cannot be conceded. Such an arrangement would, in a very plain way, infringe an important provision of the constitution of this state. Article 1, Section 9, of that instrument declares that 'no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by Justices of the Peace,' etc. The purpose of this clause was to prevent the bringing of any citizen under the reproach of being arraigned for crime before the public, unless, by a previous examination taken in private, the grand inquest had certified that there existed some solid ground for making the charge. It took from the law officer of the state, the Attorney-General, one of the established prerogatives of his office, that of filing his information against supposed offenders, and thus putting them on trial at his own volition. The reputation of every man was thus put under the care of a single specified body. The language of the constitutional clause is very comprehensive, and the specified exceptions show conclusively that it was intended to cover the residue of the entire field of criminal accusation. * * * *If it be said the punishment is only a fine, the answer is, the restraining clause in question has nothing to do with the result or effect of the trial, its*

> *object being to save from the shame of being brought before the bar of a criminal court, except in the authorized method after an antecedent inquisition.* I am clearly of opinion that a trial of a person for this offense before the municipal court would be an act utterly void."

We cannot agree with the Attorney-General's conclusion that the question of the jurisdiction of the Recorder's Court over the subject-matter of the case depends not upon the evidence produced, but upon the offense with which the defendant is charged. While it is true that the question as presented, in *State* v. *Anderson, supra,* was whether "a certain statutory provision which prohibited prosecution by indictment for the offense of keeping a disorderly house, and attempted to substitute in its place prosecution under a city ordinance, was unconstitutional because the offense of keeping a disorderly house was a common law offense and could not be prosecuted except by indictment and trial by jury"—and therefore that that case does not present a clear cut illustration of the principle we are invoking—we nevertheless submit that *Riley* v. *Trenton, supra,* does furnish a clear illustration of that principle, and that there is nothing contained in either *State* v. *Anderson, supra,* or in *Geiger* v. *Recorder,* 96 *Atlantic,* 1006, to *necessarily* militate against, or negative, the soundness of that doctrine.

It is true that in *Geiger* v. *Recorder,* 96 *Atlantic,* page 1006, not only the evidence showed, but the *complaint* also charged, that the defendant had been guilty of acts amounting to assault and battery, but the conviction was that the defendant was "guilty of interfering with

complainant while he was lawfully upon Coit Street, in the town of Irvington, and of being a disorderly person under Section 3 of 'An Act Concerning Disorderly Persons'" (2 Comp. St., 1910, page 1927). There was no attempt on the part of the Recorder to convict the defendant of an assault and battery. The complaint was interpreted by the Recorder as charging disorderly conduct only. The Recorder had no jurisdiction to try a case for assault and battery. The part of the complaint which alleged that the defendant "did beat said complainant upon the face and body" was merely introduced as corroborative of the charge against him of being a disorderly person. It was merely cumulative language and had no place as part of the complaint itself, the Recorder being absolutely without jurisdiction to try a case for assault and battery. The controlling point was that the *evidence* showed that the defendant was *guilty* of *assault and battery,* and there is nothing in the case to necessarily indicate that if the complaint had contained no reference to the beating of the complainant the result would not have been the same.

State v. *Gratz,* 86 *N. J. L.,* 483 (cited in the Attorney-General's Brief, p. 9), is not in point, because, as we have already attempted to argue, the test is not whether giving the Recorder jurisdiction would be twice putting the defendant into jeopardy, but whether the effect of conceding the Recorder jurisdiction would be conceding something unconstitutional in that it would be subjecting the defendant to the *shame and disgrace of having his offense publicly inquired into and at least one element of it punished, except by the authorized method.*

State v. *Gratz* is, moreover, also distinguishable for another reason, viz., because there the acquittal

by the jury in the municipal police court, which was set up as a defense under a plea of *"autrefois acquit"* to an indictment for assault and battery was an acquittal of an offense against a municipal corporation for a *violation of an ordinance,* and the rule laid down in *Howe* v. *Treasurer,* 37 *N. J. L.,* page 147, applied, viz., that the same act might constitute an offense both against the state and municipal corporation, and both might punish without violation of any constitutional principle.

We submit that the right of a municipality to punish for a wrong done to it by an offense, and the right of the state to punish for the wrong done to it by the same offense, is a very different proposition from the state punishing by two different methods a single ~~defense~~ offense.

In order to emphasize the point which we are endeavoring to argue, let us for a moment imagine or assume (contrary to the fact) that an automobile is a vehicle of remote antiquity, and that the operating of an automobile upon a public highway by a person under the influence of intoxicating liquor was, and is still, a common law offense entitling the offender to indictment and trial by jury. The point is that the Legislature could not, under those circumstances, deprive one guilty of that offense of his right to indictment and trial by jury by simply stating that hereafter the offense should constitute a disorderly act, and should render one guilty of it liable to summary trial without a jury as a disorderly person, and to imprisonment in the county jail for not less than thirty days or more than six months. We submit that the effect of such legislation would be by merely changing the name of the crime and altering the degree of

punishment to deprive the offender of his right to trial by jury for a *disgraceful offense.*

Analogously, as the committing of a common nuisance was always, and is still, an indictable offense at the common law, entitling the offender to a trial by jury, the Legislature cannot deprive one guilty of that conduct of his right to a trial by jury by simply declaring that though the manner in which he operates his automobile while intoxicated makes him guilty of committing a public nuisance, indictable as such, he can be deprived of his right to a jury trial by simply denominating his offense a disorderly act and punishing it as such.

Is it possible that if in the case at bar the evidence had shown that Rodgers had run his automobile amuck among a crowd of children, killing several of them, it would not have been the duty of the Recorder to dismiss the charge against him for disorderly conduct, and to hold him for the action of the grand jury?

The case of *Curtis* v. *Joyce,* 99 *Atl.,* 932, throws no light on the subject under discussion. In the case at bar, the Court found from the evidence that the natural probability that a person driving an automobile while intoxicated would be a public nuisance had actually proved true, as the evidence showed that the defendant had been "good and drunk," and while in that condition had driven a large automobile on a public street of a city and through the front window of a saloon, etc. (Opinion, p. 18).

In *Curtis* v. *Joyce, supra,* there was no evidence, except to show the bare fact that the accused had

been under the influence of liquor while driving the automobile. The Court said:

> "The eighth reason, if we may judge from the respondent's brief, raises the question that the prosecutor was deprived of his constitutional right to a trial by jury. This question is similar to that discussed in the *Rodgers* case, 99 Atl., 931, just decided, and it would be interesting to consider whether the same rule would apply to a case where the only proof was that the defendant drove an automobile on a public street while he was under the influence of intoxicating liquor. We are precluded from dealing with this question, as the prosecutor has abandoned his eighth reason."

Counsel for the plaintiff lays stress upon the fact that the defendant could have been convicted of the offense of which he was convicted by confining the evidence to the mere fact that he was operating the automobile while intoxicated without adducing any evidence as to the manner of his driving, or as to the result of his driving, or as to the extent of his intoxication, etc. Possibly that may be true. Had the trial been so conducted, Rodgers would not have been disgraced by its being shown that he was guilty of a crime indictable under the common law. But counsel carefully introduced all this incriminating testimony, and it is submitted that in doing so counsel ousted the Recorder of jurisdiction over the case.

POINT II.

Assuming Rodgers to have been guilty of two offenses, both, however, against the State—one of violating the supplement to the Disorderly Persons Act, of which he was in fact convicted, and the other of committing a public nuisance—the former offense merged in the latter, and he could not be lawfully convicted of the former.

In *Johnson* v. *State,* 29 *N. J. L.,* 453, this Court held that "The doctrine of merger only applies *where the same act constitutes both offenses.*"

In the *Geiger* case the very same act which constituted the disorderly act of obstructing another person on the public street also constituted an assault and battery on such person. The accused person obstructed another on the street by an act of assault. So in the case at bar. The act or series of acts consisting in the disorderly conduct of operating an automobile while under the influence of intoxicating liquor, appeared from the evidence to be of so extreme a character as to constitute the defendant guilty of committing a public nuisance. The same identical act or series of acts of driving his automobile while under the influence of intoxicating liquor, were the same acts which made him a public nuisance. Consequently, under the rule laid down in *State* v. *Johnson,* the minor offense of being a disorderly person merged in the graver indictable offense of committing a public nuisance.

Inasmuch as Rodgers could not legally be convicted of the two different offenses arising out of

the same identical acts on his part, public policy required that, if punished at all, he should be punished for the graver common law offense.

The doctrine of merger is based upon the rule that a person cannot be twice tried for the same offense, and that it is consequently contrary to public policy to permit a person to be convicted of a smaller offense that may be carved out of a transaction involving a crime of a graver nature, and thus escape the punishment to which he is properly amenable.

In *Commonwealth* v. *Roby*, 29 *Mass.*, 496, Chief Justice SHAW (pp. 502, *et seq.*) discussed what he styled the great principle and fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offense in regard to its application to a plea of former conviction or former acquittal. The learned Judge, after first stating that the application of the maxim "requires the consideration, whether in fact the party pleading has before been put in jeopardy, and if so whether it can be said to be for the *same offense,* and after a consideration of the question of what circumstances of fact and law would constitute an identity of the offense, drew the following conclusion: "From these considerations it appears to us that the true test to determine whether a conviction or acquittal upon one indictment is a good bar to another is well expressed in *East's Crown Law,* as drawn from the case of *Rex* v. *Vandercomb and Abbott,* 2 *Leach,* 816. These cases establish the principle that unless the first indictment were such as *the prisoner might have been convicted of it upon proof of the facts contained in the second indictment* (the italics are ours), an acquittal on the first indictment can be no bar to the second. So,

in a recent case the doctrine was recognized that such plea is no bar, unless *the facts charged in the second indictment would have warranted a conviction in the first* (italics ours). *Rex* v. *Taylor,* 3 *Barn and Cress,* 502. So Chitty, speaking of the identity of the offense requisite to support such a plea, states it thus: 'As to the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that *evidence of the one will not support the other* (italics ours), it is inconsistent with reason, as it is repugnant to the rules of law to say that the offenses are so far the same; that an acquittal of the one will be a bar to the prosecution for the other (1 *Chitty Criminal Law,* 453).' "

Applying this rule to the case at bar, the defendant has been convicted by the Recorder as a disorderly person upon proof that he had been driving an automobile while he was under the influence of intoxicating liquor.

But the Supreme Court held that the facts which proved his guilt under that charge showed that he had been guilty of the common law crime of being a public nuisance, for which he should have been indicted and put upon trial by a jury.

If, however, the conviction before the Recorder is affirmed by this Court, overruling the Supreme Court, then we submit there can never be a prosecution of the defendant for the common law crime, because the evidence which would be sufficient to convict him of the common law crime, was precisely the same evidence under which he was in fact convicted of being a disorderly person. The result would be what the Supreme Court declared in the *Geiger* case could not be done, that the Re-

corder would have reduced the common law crime of being a public nuisance to the merely petty statutory offense of being a disorderly person.

POINT III.

The evidence brought up by the writ of certiorari established that Rodgers had been guilty of committing a common law nuisance, and the Supreme Court correctly so decided.

We have no quarrel with the definitions cited by the learned Attorney-General of a "common law nuisance," nor with his distinction between a "common law nuisance" and an ordinary "trespass."

We simply submit that the decision of the Supreme Court has again been misunderstood. It was not the act of *"trespass"* of which Rodgers, under the evidence, was clearly guilty that necessarily made him also guilty of the crime of committing or being a public nuisance. It was the fact that he was driving his automobile "an engine of great power" on a public street without any control over it—running amuck as it were—*as demonstrated by the fact that he did drive through the front window of a saloon right back to the front end of the bar in the saloon* that constituted him a public nuisance. Counsel chooses to opine that the Supreme Court meant that the mere driving the automobile through the front window of the saloon constituted the *"common nuisance,"* but obviously that was not so. What the Supreme Court held was—that a man who was—to use Mr. Justice SWAYZE'S language "good and drunk"—and who was driving

his automobile manifestly without any control over it in such a way as to culminate in ultimately driving it through the front window of a saloon, breaking glass, etc., was evidently *before that catastrophe happened,* and while he was still on the public street—operating his car in a manner menacing to the public—and to adopt the language of the Court, "well within the definition of a public nuisance."

If, however, it should be held that the reasons given for the Supreme Court's decision were unsound, we nevertheless submit that the decision itself was sound, for the following additional reasons, which were fully argued before the Court below, but which were overlooked or disregarded by that tribunal.

POINT IV.

The supplement of 1913 (Chapter 67, P. L. 1913, p. 103) to the Disorderly Persons Act under which the prosecutor of the present writ was convicted, conflicts with, but does not repeal, the provisions of the supplement of April 16, 1909, to the Crimes Act (Chapter 127, P. L. 1909, p. 200), whereby it is made a misdemeanor to drive a motor vehicle while in an intoxicated condition, and consequently the prosecutor, if guilty of any offense, was guilty of a misdemeanor under that provision of the Crimes Act.

The provision of the supplement to the Disorderly Persons Act under which the prosecutor was convicted, is that any person who shall operate

an automobile over any public street or highway, while under the influence of intoxicating liquors, shall be adjudged to be a disorderly person.

The provision of the supplement of 1909 to the Crimes Act, is that any person who shall drive a motor vehicle while in an intoxicated condition, shall be guilty of a misdemeanor.

By this provision of the supplement to the Crimes Act, it is a misdemeanor to drive a motor vehicle *anywhere* while in an intoxicated condition, whether on a public street or highway or upon private property; whereas by the supplement to the Disorderly Persons Act under which the prosecutor was convicted, it is made simply a disorderly act to operate a motor vehicle upon a public street while under the influence of liquor.

If, therefore, it should be held that the provisions of the supplement to the Disorderly Persons Act repealed *pro tanto* those of the supplement to the Crimes Act, the result would be that it is still a misdemeanor to drive an automobile while in an intoxicated condition anywhere except upon a public street or highway; that if an intoxicated person drive his automobile on his own private property he can be convicted of having committed a misdemeanor, but if he confine his intoxicated conduct to a public street he can only be held guilty of being a disorderly person. We think that result is too absurd to be upheld by this Court as the true intention of the Legislature.

Judge Cooley, in his *Treatise on Constitutional Limitations,* p. 199, advances the doctrine that the same act may constitute an offense, both against the state and the municipal corporation, and that

both may punish without violation of any constitutional principle.

Probably this principle was what the Legislature had in view when enacting the supplement to the Disorderly Persons Act, though if so, it had a mistaken appreciation of what that principle is.

It may be that if the City of Paterson had *lawfully* passed an ordinance prohibiting, under fine and imprisonment, a person from driving an automobile within the limits of the City of Paterson while in an intoxicated condition, the punishment under that ordinance would be simply for the offense against the municipal corporation, the City of Paterson, and would still leave the accused liable to punishment for the offense against the State. But the State itself could not make the same act both a crime and a disorderly act, punishable in different ways.

It is impossible to draw any distinction between being in an intoxicated condition, the language of the supplement to the Crimes Act, and being under the influence of intoxicating liquor, the language of the supplement under which the prosecutor was convicted.

The Act under which the prosecutor was convicted is, therefore, open to this criticism: if enforced, it has either the absurd effect of rendering the driving of an automobile by an intoxicated person *on a public highway,* a mere disorderly act, while the same act done *on private property* is a misdemeanor, "a result so outrageously inconsistent with common reason as to demonstrate that such result could not have been within the legislative design" (*Gulick* v. *Gulick,* 41 *N. J. Law,* 13, 14); or

else, if it does not repeal the Act of 1909 to any extent, the result is to leave it open to the State to try the offender either for a misdemeanor or a disorderly act, according to the whim or caprice of the party complaining; in the one case entitling the offender to an indictment and trial by jury, and in the other case depriving him of those rights. The second construction would certainly, we submit, render the act unconstitutional in that it would be depriving the defendant, at the option of the State, of his constitutional right to a trial by jury, and as the first construction could not have been within the legislative design, being so outrageously inconsistent with common reason, we submit that the statute is without any legal force or efficacy, and that the Supplement to the Crimes Act of 1909 remains in full force and effect.

The precise point is, shall a construction involving an absurdity be placed upon the statute, or a construction involving the unconstitutionality of the Act? In *State* v. *Clark,* 29 *N. J. Law,* 96, it was held that if the literal construction of the words of a statute make the Act absurd, it must be so construed as to avoid the absurdity, and it is also held that if of two interpretations of a statute, one leads to a result that exceeds the power of the Legislature, the other will be deemed what the Legislature intended (*East Orange* v. *Hussey,* 70 *N. J. Law,* 244). We have therefore to choose between two interpretations, one involving an absurdity and the other involving the unconstitutionality of the Act. By adopting the latter interpretation the statute has no force at all, which surely is preferable to an interpretation which would give it an absurd effect.

There would, therefore, seem to be every reason for the Court to hold that the supplement to the Disorderly Persons Act, under which the prosecutor was convicted, does not repeal the supplement to the Crimes Act, making the driving of a motor vehicle while in an intoxicated condition, a misdemeanor. So that, assuming the prosecutor was under the influence of liquor, as charged, he was guilty of a misdemeanor under the provisions of the Supplement to the Crimes Act, and his case we submit should be governed by the rule laid down by this Court in the case of *Geiger* v. *Recorder's Court of the Town of Irvington*, 96 *Atl. Rep.*, 1006.

In that case the prosecutor of the writ had been adjudged guilty of being a disorderly person under Section 3 of the Disorderly Persons Act, for obstructing another while lawfully on a street, but the evidence showed that if he had been guilty of any offense, it was that of assault and battery, and not merely of being an interferer or obstructor.

The Supreme Court held in its *per curiam* opinion, "that to permit this construction to stand would be to allow a Recorder to reduce the crime of assault and battery to that of disorderly conduct; for every assault and battery on a public street is an interference with the free passage of the one assaulted"; and the conviction was set aside.

Paraphrasing that opinion, we submit that to permit the conviction in the present case to stand would be to allow a State Inspector of Motor Vehicles, or the Recorder acting upon his complaint, to reduce what is a misdemeanor in operating an automobile while in an intoxicated condition, to that of disorderly conduct, and conse-

quently, we submit that the present conviction should be set aside.

POINT V.

The conviction was illegal inasmuch as the provision of the supplement to the Act of 1913 is unconstitutional because it deprived the prosecutor of his constitutional right to trial by jury.

The provisions of the Constitution of New Jersey relating to the rights of persons in regard to criminal prosecution are Sections 7, 8 and 9 of Article I, which article sets forth the rights and privileges of the citizens which it was the purpose of the Constitution to particularly safeguard; the enumeration of those rights in the article constituting what is commonly called the "bill of rights."

These provisions read as follows:

> "Section 7. The right of a trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed $50, by a jury of six men.
>
> 8. In *all* criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.
>
> 9. No person shall be held to answer for a criminal offense, unless on the presentment

> or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia, when in actual service in time of war or public danger."

Sections 7 and 8 relate to the right to trial by jury now immediately under discussion.

The language of these two sections is so simple and their meaning so plain, particularly in regard to the provisions of Section 8, that if it were not for certain decisions ~~of this Court~~, it would seem impossible that any doubt could arise as to the right to a trial by jury upon any charge of a criminal nature. It would seem that the only possible question which could arise under the simple language of Section 8 would be the question whether or not the accused was being subjected to a criminal prosecution.

It is a very remarkable circumstance that the decisions of our Courts dealing with the right to a jury trial are all based upon the provisions of Section 7, which provides that the right of a trial by jury shall remain inviolate. The provisions of this section are, of course, perfectly simple and perfectly plain, namely, that the right of a trial by jury which is to remain inviolate is simply that right as it existed at the time of the adoption of the Constitution; that whatever right to a trial by jury a citizen had at the time the Constitution was adopted he is to continue to hold inviolate. Under this section, apart from the provisions of the following Eighth Section, it would have been the duty of the Court, in a case like the present, where a jury trial has been demanded and refused, to inquire whether the prosecutor would, at the time the Constitution was adopted, have been entitled to such right.

It does not seem possible, however, by any mode of interpretation, in construing the provision of Section 8, that in *all* criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury, to hold that that language does not mean what it so plainly says, but that it simply means that in all prosecutions the accused shall have only such right as he would have had at the time of the adoption of the Constitution, or that he shall have such right only where he is charged with a "heinous offense" within the meaning of that term as used in the case of *State* v. *Rockafellow,* 6 *N. J. Law,* 332; or that when the Constitution speaks in that section of *all* criminal prosecutions it did not intend to include a "minor offense" within the meaning of that term, as used ~~in the decision of this Court~~ in the case of *State* v. *Lakewood Market,* 84 *N. J. Law,* 512; or that it did not intend to include petty offenses within the meaning of that term used in the case of *Johnson* v. *Barclay,* 16 *N. J. Law,* 1.

There is nothing whatever to show that the people of the State, in adopting this Eighth Section, providing for a trial by jury in *all* criminal prosecutions, really intended to leave it to the Courts to decide of how serious a nature the accusation must be, or of what character of crime, in order that the accused should have the right in question.

It is true that by Section 9 the people did provide that a person *might be held to answer* for a criminal offense in cases cognizable by justices of the peace, and in certain other cases, without presentment or indictment by a grand jury.

The fact that in Section 9 the general rule thereby promulgated, that no person shall be held to an-

swer for a criminal offense unless on the presentment or indictment of a grand jury, contains expressly this exception, viz.: "except * * * in cases cognizable by justices of the peace," and the fact that Section 8, which provides, "that in *all* criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury," contains no such exception to that rule, would clearly indicate that no such exception to the rule promulgated in Section 8 was intended to be implied. If it was thought necessary, as it was, to insert the exception in Section 9, and if it was intended that the same exception should prevail in Section 8, why was it not there inserted? *Expressio unius exclusio alterius.*

The natural and logical construction of these two Sections of the Constitution, 8 and 9, taken together, is, that while a person may be *held* for trial to answer for a criminal offense cognizable by a justice of the peace, without an indictment by a grand jury, when it comes to the *trial* for which the person is so held, he should be entitled to be *tried* by an impartial jury.

In the case of *Brown* v. *State,* 62 *N. J. Law,* 666, in which the right of the Legislature to regulate the qualifications of jurors, and the number of challenges, was the matter to be decided, and not the right to a jury trial itself, and in which consequently the question now under discussion was not involved, the opinion of the Court of Errors and Appeals, by DEPUE, *J.,* contains this language (p. 687):

> "By the Constitution of 1844 it was declared the right of trial by jury should remain inviolate, and a clause was added that

> in *all* criminal prosecutions the accused should have a right to a speedy and public trial by an impartial jury. In *State* v. *Fox,* Chief Justice Green, referring to the clause just quoted, said: 'This clause confers upon defendants in criminal cases no new right. It invests with the constitutional sanction what was previously a common law right. *Every criminal* is entitled at common law to a trial by an impartial jury. The question still remains, what constitutes impartiality, or rather, what is the test or evidence of that bias or partiality which disqualifies the juror? This must be settled by common law principles."

The case of *State* v. *Fox,* from which the quotation was made in the opinion of the Court of Errors in the case last cited, likewise involved the right of the Legislature to regulate the right to challenge a juror, and did not involve the right to a jury trial itself.

The language of Chief Justice GREEN and the context of the opinion shows that the question of how far the right to a jury trial extends—whether so as to include *"all* criminal prosecutions," according to the simple meaning of the actual language of Section 8 of the Constitution, or whether it is limited to extend only so far as it may have extended at the time of the Revolution—was not in the mind of the learned Judge when he stated that "this clause (viz., Section 8, Article I) confers upon defendants in criminal cases no new right." He simply points out that the clause in question confers no new right because *every* criminal was entitled at common law to a trial by an impartial jury. So that this expression of the learned Judge, if applied to the case at bar, was irrelevant, and

so far as it is approved in the opinion of the Court of Errors and Appeals in the *Brown* case, it is likewise irrelevant.

And it would be an astonishing result had the question now involved been in the mind of the Judge by whom it was used, for, as pointed out in the opinion of DEPUE, *C. J.*, in the *Brown* case, *supra,* the provisions of the Eighth Section were added to the Constitution in 1844.

The result then would be that by adding this Eighth Clause to the Constitution with all the solemnity involved in the adoption of such an instrument, the people in fact did nothing so far as effectuating any additional safeguards for their personal liberty.

The original Constitution of 1776 had provided in Section XXII "that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this Colony, without repeal, forever."

This provision was re-enacted by the Seventh Section of Article I of the Constitution of 1844, that "the right of a trial by jury shall remain inviolate"; and then this new provision was added by Section 8, that "in *all* criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury."

But if this *dictum* is correct, then nothing substantial was really added to the Constitution by Section 8, and it is nothing but mere unnecessary verbiage which does not even mean what it says.

Were this a case of first impression, and were there no opposing authorities, we should feel safe in resting the decision of the present case upon a

proper and reasonable construction of the simple language of this Eighth Section of Article I of the Constitution. We should simply insist that the language there used, "that in *all* criminal prosecutions the accused should have the right to a * * * trial by an impartial jury," is incapable of being construed so as to mean anything except what it expressly states; that it includes a criminal prosecution for any kind of a criminal offense, whether of an indictable nature, or otherwise; whether for a common law crime or a statutory offense; whether for an offense of a petty or an heinous character; and regardless of the character of the punishment to be inflicted upon the accused, if found guilty.

However, there are numerous authorities which seemingly arbitrarily hold that notwithstanding the simple meaning of this language of the Constitution, the right to a jury trial must be governed by the usage in England at the time of the Revolution, and the usage which has continued or grown up in this country since that time.

Proffat on Jury Trial, ~~cited by this Court~~ in the case of *State* v. *Lakewood Market Co.,* 84 *N. J. Law,* 512, at Section 98, says:

> "A very dangerous and reprehensible principle has been established in a few states, that the right to a trial by jury only exists in those cases where a person is charged with an offense that was a crime at common law, and that it does not extend to such crimes as have been created by statute since the adoption of the Constitution. * * * This would establish a principle of the most pernicious consequences if generally held and acted on. If carried out as enunciated

> by the court, a person may be subjected to infamous punishment, even imprisonment, for any length of time without a trial by jury, merely because it seemed fit to the legislature to make an act criminal which was before unknown as a crime. If this doctrine be accepted it would be competent for the legislature to practically abolish trial by jury and render the right to it an illusion and a mockery. * * *
>
> In Vermont it is held that the guarantee extends to all cases fit to be tried by a jury according to the course of the common law, although the cause of action arise on a statutory offense since the adoption of the Constitution (*Plimpton* v. *Somerset,* 33 *Vt.,* 282); and this is substantially the doctrine held in the New York cases and also to be accepted as a general constitutional provision."

We concede that the question of what was the practice at the time of the adoption of the Constitution would be pertinent and would govern did the provisions of the Constitution simply require that the right to a jury should continue unimpaired as it existed at the time of the adoption of the Constitution, as would be the case if Section 7 of our Constitution were the only provision concerning the subject. But otherwise, we contend, that the case should not be governed by what has been the practice, for it is possible that a wrong practice may have grown up, and we do not concede that the right to personal liberty, involved in the right to a jury trial, can be lost by the growing up of a practice impairing such right; but in that case we contend that the practice should be abolished and the right restored.

It is remarkable, upon an examination of the reports, to find that there is no case reported in this State in which the provisions of Section 8 of Article 1 contained in the Constitution of 1844, are construed in relation to the question involved in the present case; and there is no decision by any Court of this State which we have been able to find, in regard to the right to a jury trial conferred by that section of the Constitution; although there are numerous decision which we propose to discuss, involving the provisions of Section 7 of the same article.

In these decisions the provisions of Section 8 are entirely ignored so far as such provisions may have affected any possible change in the previous law.

The cases since 1844 are decided precisely as if Section 8 had never been added to the Constitution.

For instance, the third headnote in the case of *McGear* v. *Woodruff*, decided ~~by this Court~~ in 1868 (33 *N. J. Law*, 213), states that the principle decided in *Johnson* v. *Barclay*, 1 *Harr.*, 1, must still control, although the earlier case was decided in 1837, when the Constitution of 1776 was still in effect.

The opinion in the later case, *McGear* v. *Woodruff*, construes the Seventh Section, but contains no mention whatever of Section 8. We quote from the opinion as follows (33 *N. J. Law*, 216):

> "The language of the seventh section of article first of the constitution of 1844, that 'the right of a trial by jury shall remain inviolate,' is not substantially different from that of the twenty-second article of the constitution of 1776, 'that the inestimable right

of trial by jury, shall remain confirmed as part of the law of this colony, without repeal, forever.' By that section it was not intended to introduce trial by jury in cases where it did not exist before, but merely to preserve it inviolate in cases where it existed at the time of the adoption of the constitution. Prior to the adoption of the constitution of 1776, convictions before magistrates for *petty criminal offenses,* and violations of police regulations were of frequent occurrence, and were recognized as part of the laws of England. Since the adoption of that constitution, and prior to the adoption of the constitution of 1844, that practice was pursued in this state without objection. It was not intended, by the seventh section of the first act of the constitution of 1844 to introduce trial by jury in these cases where by law and by long practice the right did not previously exist. In the *State* v. *Zeigler, S. C., June Term,* 1867, Mr. Justice Elmer expressed a doubt whether a pecuniary penalty exceeding sixteen dollars, that being the largest sum which could be tried by a justice without a jury, before the constitution of 1776, can now be enforced, otherwise than by the verdict of a jury, if demanded by the defendant. In *Johnson* v. *Barclay,* 1 *Harr.,* 1, this court held in a case where a conviction, under the act for the suppression of vice and immorality, was had for penalties above the sum of sixteen dollars, that the defendant was not entitled to a trial by jury. And that the twenty-second article of the constitution then in force, did not extend to proceedings before magistrates under that act. Indeed, extensive and

> summary police powers are constantly exercised in all the states of the Union for the repression of breaches of the peace and petty offenses, and these statutes are not *supposed* to conflict with the constitutional provisions securing to the citizen a trial by jury. *Sedg. Stat. Constr.,* 548; see also 1 *Bish. Cr. Prac.,* note 7 to §758, and cases there cited. This constitutional provision does not prevent the enforcement of the by-laws of a municipal corporation without a jury trial."

All that this case decided is contained in the last sentence in the above quotation, so that it is not a controlling authority in deciding the present case; it brought up for review proceedings had before the Mayor of the City in an action of debt brought before him in the name of the Treasurer of the City, to recover a penalty of $2 for the violation of a city ordinance in relation to streets and highways.

In *Johnson* v. *Barclay,* 16 *N. J. Law,* 1, the opinion contains this language (p. 6):

> "7th Objection. The justice refused a trial by jury.
>
> In doing so, the justice was right. Convictions before a justice, were in practice in this state, long before the Constitution was formed—by the twenty-second article of that instrument, the trial by jury was to 'remain confirmed' as a part of the law of this (then) colony; but it was not introduced as a *new* mode of trial, in all cases—it was adopted, or rather continued, as it was then used in England and in this colony, and was not at that time, either there or here, resorted to in cases of summary proceedings and convictions for petty offences."

That case was a suit for a penalty brought by the plaintiff as informant, suing in behalf of the Township against the defendant, under the provisions of the Act for suppression of vice and immorality (Rev. 378), for profane swearing. It was tried before a justice of the peace without a jury and resulted in a judgment against the defendant for $16.50 penalty to be forfeited for the use of the poor of the Township; and the judgment was upheld in this court.

As previously stated, that case was decided before the adoption of the Constitution of 1844 containing the Eighth Section of Article I.

The case of *Howe* v. *Treasurer of Plainfield,* 37 *N. J. Law,* 145, was likewise a suit for a penalty. It was brought under the provisions of a city ordinance for selling liquor without a license. It resulted in a fine of $20 upon the defendant. He had demanded a jury trial which had been refused. The city charter, while preserving the right to a jury trial in all cases where the punishment prescribed might be imprisonment, or the fine exceeded $20, permitted the trial without a jury where the fine was less than that sum; and this Court upheld the constitutionality of that provision of the charter, and the legality of the fine imposed upon the defendant. The opinion follows the same reasoning as that in the case of *McGear* v. *Woodruff,* which is cited as an authority in the decision.

In the case of *Mayor, &c., of the City of Vineland* v. *Denoflio,* 65 *Atl. Rep.,* 837, the opinion ~~of this Court~~ refers to a provision of Section 12 of the Borough Act of 1897, relating to the Recorder's Court of a borough, that "in all cases where the fine or penalty shall exceed $20, or the punishment

shall be imprisonment for a term exceeding seven days, there may be a trial by jury, to be conducted as in cases now triable in courts for the trial of small causes," as conserving a public right guaranteed by the Constitution.

The opinion does not state what section of the Constitution the Court had in mind, as being conserved by the statute, or whether the Court had reference to the Seventh Section of Article 1, or to Section 8, or to both sections.

In that case a jury had been refused by the Recorder except upon the prepayment of the jury fees, and the conviction was set aside in the Supreme Court. The charge was for disorderly conduct in violation of one of the borough ordinances.

The case of *State* v. *Lakewood Market Co.,* 84 *N. J. Law,* 512, decided ~~in this court~~ in 1913, involved a review of a conviction in a proceeding before a Justice of the Peace on a complaint of a Fish and Game Warden, who sued for the use of the State. The complaint alleged that the Market Company unlawfully had in its possession, contrary to the provisions of the Fish and Game Act of 1903, a number of wild duck, for which it was liable to a penalty of $20 a piece. One of the grounds upon which it was sought to set aside the conviction was that a jury trial had been refused. Upon that point the opinion was as follows (p. 523):

> "Lastly, it is contended that the judgment should be set aside because the justice of the peace refused the defendant below a trial by jury.
>
> We think not. It has been repeatedly held in this state that in a summary procedure

> for the collection of a penalty for violation of a police regulation, neither party is entitled to a trial by jury. One of the leading cases on this subject is *Johnson* v. *Barclay,* 1 *Harr.,* 1. Another is *McGear* v. *Woodruff,* 4 *Vroom,* 213. These were followed by *Shivers* v. *Newton,* 16 *id.,* 469, and *Carter Brothers* v. *Camden District Court,* 20 *id.,* 600."

In the case of *Minard* v. *Dover Gas Co.,* 76 *N. J. L.,* 132, cited in the opinion in the *Lakewood Market Company* case, *supra,* it was held ~~by this Court~~ that the proceeding to collect the penalty under the Fish and Game Act was a civil action, so that neither that case nor the *Lakewood Market Company* case is decisive of the right to a jury trial in a criminal proceeding.

The opinion in the case of *Carter Brothers* v. *Camden District Court,* ~~decided in this Court,~~ 49 *N. J. Law,* 600, while discussing the right to a jury trial under Section 7 of Article I, contains no reference whatever to Section 8 of the same Article. That was a suit in the District Court by the State Dairy Commissioner to recover a penalty for violation of the Oleomargerine Law; it was consequently a civil proceeding (*Minard* v. *Dover Gas Co., supra*), and it is not, therefore, decisive of the present question.

We quote from the opinion as follows (p. 601):

> "It is admitted that the statute in question is in the nature of a police regulation. It was enacted to prevent cheating in the sale of articles made to imitate butter and cheese. The proceedings to enforce it are intended to be summary in their character.

Before the adoption of the constitution of 1776, penalties for the violation of statutes, which provided for summary proceedings before a magistrate for their enforcement, were disposed of by the magistrate without a jury. The defendants in such cases were not entitled to trial by jury. Neither the act now in question, nor any other act, has given to either party in such case the right of trial by jury. It is claimed by these defendants as a constitutional right. The language of the constitution of 1776 is peculiar. It does not give the right of trial by jury where it did not previously exist. It does not enlarge, but merely secures the right, as it then existed, by the following clause, viz.: 'Section 11. The inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever.'

Neither does the constitution of 1844 enlarge the right. The language of that instrument is: 'The right of trial by jury shall *remain* inviolate.' The meaning of the language is that where the right to a jury existed before the constitution, it could not be taken away by the legislature; but where there was no such right previously, it was not extended to such cases.

The leading case on the subject, in this state, is found in *Johnson* v. *Barclay,* 1 *Harr.,* 1, 6. In the opinion in that case Chief Justice HORNBLOWER said: 'Convictions before a justice were in practice in this state long before the constitution was formed.' By that instrument (constitution of 1776) the trial by jury was 'to *remain* confirmed' as a part of the law of the colony; but it was

> not introduced as a new mode of trial in all cases. It was adopted, or rather continued, as it was then used in England and in this colony, and was not, at that time, either there or here, resorted to in cases of summary convictions for petty offences.
>
> Since the adoption of the constitution of 1844 the leading case is *McGear* v. *Woodruff*, 4 *Vroom*, 213, in which Judge DEPUE, referring to the clause in that instrument, 'the right of trial by jury shall remain inviolate,' said, 'it was not intended to introduce trial by jury in cases where it did not exist before, but merely to preserve it inviolate in cases where it existed at the time of the adoption of the constitution.' "

In the case of *Unger* v. *Fanwood*, 69 *N. J. Law*, 548, it was attempted to set aside upon certiorari, an ordinance of a township committee regulating the speed of automobiles, and providing punishment for its violation. The prosecutor of the writ had been arrested for an alleged violation of the ordinance but the proceedings upon the arrest were not brought up with the writ. It was, therefore, dismissed by this Court upon the ground that the prosecutor had no standing to sue out the writ which attacked the ordinance, but did not attack the alleged illegal proceedings against himself.

The Court, however, considered the validity of the ordinance and held it to be legal, notwithstanding it permitted a conviction before a Justice of the Peace without a jury, upon the ground that it provided for a summary proceeding which might be tried without a jury, as it could have been before the Constitution of 1844 was adopted.

The opinion in that case laid down the rule that where in a case of that kind the Justice had power to impose a penalty by imprisonment, it was a criminal proceeding, and not a civil suit, citing *Johnson* v. *Barclay,* 1 *Harr.,* 1, *supra,* and *McGear* v. *Woodruff,* 4 *Vr.,* 213, *supra.*

That case is, therefore, authority *by way of obiter dictum* ~~in this Court~~ for the proposition that *for the violation of a municipal ordinance* a conviction involving punishing by imprisonment may be had without a jury trial; but further than that it should not be considered binding upon this Court.

In *Bassette* v. *State,* 51 *N. J. Law,* 502, ~~this~~ the Supreme Court upheld a conviction before a Justice of the Peace under Section 6 of the Disorderly Act (Rev., p. 305) for uttering loud and offensive language in a public street, notwithstanding a trial by jury had been denied to the accused. In the opinion it is simply stated that trial by jury was not given by the act, and the question of the constitutionality of the act, not having been raised, was not considered. We submit, therefore, that the case is not a decisive authority governing the case at bar.

The foregoing review of the cases in this State is, we believe, comprehensive; and we submit that while these cases indicate that the attitude of this Court has been opposed to our present contention, there is no case which is a decisive authority to that effect. We submit, therefore, that the question is still open for this Court to construe the Eighth Section of Article I, as meaning what it so clearly says, that in *every criminal prosecution,* no matter of what character, or what the degree of heinousness of the offense charged, no matter how petty the same may be, in which the accused is *charged*

with a violation of a general law of the State prohibiting an act, and inflicting a punishment by imprisonment for committing the same, the accused "shall have the right to * * * a trial by an impartial jury."

The case of *Unger* v. *Fanwood,* 69 *N. J. Law,* 548, *supra,* is authority for the proposition that the proceedings now under review constitute a criminal prosecution, and being a criminal prosecution, we submit that it should be governed by the provisions of Section 8 of the Constitution.

The correct rule of construction in regard to the Eighth Section of our bill of rights is, we submit, that laid down by the Vermont Court in the case of *State* v. *Peterson,* 41 *Vt.,* 405.

As stated in that opinion, the Constitution of Vermont contains the provision in the 10th Article of its bill of rights, "that in all prosecutions for criminal offences, a person hath a right * * * to call * * * for a speedy public trial by an impartial jury of the country." This language, it will be seen, is almost identical with that of the Eighth Section of the New Jersey bill of rights.

In addition, the Vermont Constitution also contains the further provisions in Article 12, "that when any issue in fact proper for the cognizance of a jury, is joined in a court of law, the parties have a right to trial by jury," and in Section 31, that "trials of issue proper for the cognizance of a jury in the supreme and county courts, shall be by jury, except where the parties otherwise agree." But it will be seen by a reference to the opinion that the decision of the case did not hinge upon these two additional provisions of the Vermont Constitution,

the opinion stating that "it would seem that the words in the 10th Article of the bill of rights (viz., the Article corresponding to the Eighth Section of the New Jersey bill of rights), in respect to trial by jury, are broad enough to include the case at bar."

This case is so entirely in point with the contention that we now make on behalf of the prosecutor, that a careful perusal of it is respectfully be-spoken.

Undoubtedly there were petty or minor crimes which at common law could be tried without a jury, and it has been held in many cases that the Federal Constitutional provision that all crimes, except impeachment, shall be tried by jury, is to be interpreted in the light of that fact. But the trial even of such cases without a jury was contrary to the genius of the common law, and was allowed by the English Courts only in *obedience to acts of parliament* which was not bound by a written constitution, and whose authority in matters of legislation was omnipotent, and, therefore, not to be disputed by any English Court.

Counsel for the appellant conclude their brief by a reference to the importance of informing drivers of automobiles that they are liable to prosecution if they operate their cars while in a condition of intoxication. We fully concur in this sentiment, but we are unable to see why "an adherence to the doctrine of the decision of the Supreme Court will make it practically impossible to reach the intoxicated driver of an automobile unless he conducts himself in such a manner as to make himself a public nuisance." We agree that if he does make himself a public nuisance, then before he can be lawfully tried he must be

first indicted, and that when tried he must be tried by a petit jury.

What was said by Blackstone when referring to summary proceedings *authorized by acts of parliament* in particular cases may well be repeated at this day whenever it is proposed upon grounds of convenience to dispense with juries in criminal prosecutions, and thereby introduce a new mode for the trial of crimes. He said, "And however *convenient* these may appear at first (as doubtless all arbitrary powers well executed are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern.

(Book 4, Chap. 27, p. 350.)

Respectfully submitted,

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