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Same Offense

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"SAME OFFENSE."

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Codes of California, in six large volumes, and the Consolidated Supplement thereto (now in press) in two volumes. He has contributed many other books and articles to legal literature.

1. *In General.* In the bill of rights and constitutional guaranty of the Federal and state governments, there are provisions which prohibit a person from being twice put in jeopardy for the same offense; and in the laws of many of the states there are provisions for an increase in the punishment to be inflicted upon a second or subsequent conviction for the same offense. In the protection of the rights of one accused and presented for trial, and in the determination of the punishment to be inflicted under statutes providing for an increased penalty on subsequent conviction, it becomes important to determine what is meant by the phrase, "same offense."

2. *Constitutional Provision—Federal Constitution.* The fifth amendment to the Federal constitution provides, among other things, as follows: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." In this provision, the phrase, "same offense," is equivalent to a declaration of the common-law principle that no person shall be twice tried for the same offense, and where the plea of former jeopardy is entered as a bar by reason of former proceedings in a prior prosecution, it is required of the court a consideration of whether in fact the party pleading such bar has before been put in jeopardy, and if so, whether it can be said to have been for the same offense. There may be great similarity in facts where there is a substantial legal difference in the nature of the crimes charged; so, also, there may be a diversity of circumstances, and yet the legal character of the offense remain the same. In those cases in which there is a diversity of circumstances, *e. g.*, of time and place, where time and place are not necessary ingredients of the crime charged—the offenses are to be regarded as the same. To constitute identity of offense, it must appear by the plea that the offense charged was the same, both in law and in fact.[1b] If under the first indictment the accused could have been convicted on proof of the facts charged in the second indictment, an acquittal or conviction on the first indictment constitutes a bar to a pros-

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[2]See *People v. Stephens,* 79 Cal. 428, 4 L. R. A. 845, 21 Pac. 856; *Com. v. Roby,* 29 Mass. (12 Pick.) 496; *State v. Gustin,* 152 Mo. 118, 53 S. W. 421; *R. v. Vandercomb,* 2 Leach, 816.

[1b]See first part 4.

ecution under the second indictment, and the plea of former jeopardy must prevail.[3]

3. *Same—Construction of Federal Amendment.* The fifth amendment to the Federal constitution, quoted above, is a limitation upon the powers of the Federal government, but is not intended to be, and is not a limitation upon the various states of the union,[4] and state

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[3]*Com. v. Roby,* 29 Mass. (12 Pick.) 496; *Rex v. Vandercomb,* 2 Leach 816. See foot notes 7-9.

[4]*Fox v. State of Ohio,* 46 U. S. (5 How.) 414, 12 L. ed. 213; *In re Boggs,* 45 Fed. 475.

That the fifth amendment to the Federal constitution, in its entirety, applies to the Federal government only, and is not a limitation upon the states, is well settled by the weight of decision—see authorities collected in Kerr's Consolidated Supplement to Kerr's Cyc., Cal. Codes §§ 10-21, Pen. Code part and other cases: *Livingston v. Moore,* 32 U. S. (7 Pet.) 469, 8 L. ed. 751, affirming Baldw. 424, Fed. Cas. No. 8,416; Barron use of *Tiernan v. Mayor of Baltimore,* 32 U. S. (7 Pet.) 243, 8 L. ed. 672; *Fox v. State of Ohio,* 46 U. S. (5 How.) 410, 12 L. ed. 213; *Smith v. Maryland,* 59 U. S. (18 How.) 71, 15 L. ed. 269; *Pervear v. Massachusetts,* 72 U. S. (5 Wall.) 475, 18 L. ed. 608; *Twitchell v. Pennsylvania,* 84 U. S. (7 Wall.) 321, 19 L. ed. 223; *Withers v. Buckley,* 87 U. S. (20 How.) 84, 15 L. ed. 816, affirming 29 Miss. 21, 64 Am. Dec. 126; *Edwards v. Elliott,* 88 U. S. (21 Wall.) 532, 22 L. ed. 487, affirming 36 N. J. L. 449, 13 Am. Rep. 463; *United States v. Cruikshank,* 92 U. S. 552, 23 L. ed. 591, affirming 1 Woods 308, Fed. Cas. No. 14,897; *Kelly v. Pittsburgh,* 104 U. S. 78, 28 L. ed. 658, affirming 85 Pa. St. 170, 25 Am. Rep. 633; *Presser v. Illinois,* 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. 580; *Spies v. Illinois,* 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. 22, dismissing error to 122 Ill. 1, 3 Am. St. Rep. 320, 6 Am. Crim. Rep. 570, 12 N. E. 865, 17 N. E. 898; *Re Sawyer,* 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. 482; *Eilenbecker v. District Court,* 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. 424, affirming 69 Iowa 240, 28 N. W. 551; *McElvaine v. Brush,* 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. 156; *O'Neil v. Vermont,* 144 U. S. 360, 30 L. ed. 466, 12 Sup. Ct. 393, dismissing error to 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586; *Hallinger v. Davis,* 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. 105; *Thorington v. Montgomery,* 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. 349, dismissing error to 94 Ala. 266, 10 So. 634; *Monongahela Nav. Co. v. United States,* 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. 622; *Brown v. Walker,* 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. 644, affirming 70 Fed. 46; *Talton v. Mayes,* 163 U. S. 376, 41 L. ed. 196, 16 Sup. Ct. 986; *Brown v. New Jersey,* 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. 77, affirming 62 N. J. L. 666, 42 Atl. 811; *Bolln v. Nebraska,* 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. 287, affirming 51 Neb. 581, 71 N. W. 444; *Capitol City Dairy Co. v. Ohio,* 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. 120, affirming 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62; *Ohio ex rel. Loyd v. Dollinson,* 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. 703, affirming 68 Ohio St. 688, 70 N. E. 1131; *United States v. Rhodes,* 1 Abb. (U. S.) 28, Fed. Cas. No. 16,151; *United States v. Hall,* 3 Chicago Leg. News 260, Fed. Cas. No. 15,282; *Clark v. Dick,* 1 Dill. 8, Fed. Cas. No. 2,818; *Santa Clara County v. Southern Pac. R. Co.,* 18 Fed. 389; *Kansas v. Bradley,* 26 Fed. 289; *ex parte* Ulrich, 42 Fed. 589; *In re* Boggs, 45 Fed. 475; *Clark v. Russell,* 97 Fed. 902; *Williams v. Hert,* 110 Fed. 168; *St. Louis, I. M. and S. R. Co. v. Davis,* 132 Fed. 629; *Griffing v. Gibb,* McAll. 212, Fed. Cas. No. 5,819; *United States v. Keen,* 1 McL. 429, Fed. Cas. No. 15,510; *Philadelphia and R. R. Co. v. Morrison,* 5 Phila. 522, Fed. Cas. No. 11,089; *Boring v. Williams,* 17 Ala. 516; *Fife v. State,* 31 Ark. 458, 25 Am. Rep. 566; *Ryan v. People,* 21 Colo. 122, 40 Pac. 775; *Colt v. Eves,* 12 Con. 251; *Campbell v. State,* 11 Ga. 369; *Keith v. Henkelman.* 173 Ill. 143, 50 N. E. 692; *Lake Erie, W. and St. L. R. Co. v. Teath,* 9 Ind. 559; *Griffin v. Wilcox,* 21 Ind. 384; *Butler v. State,* 97 Ind. 382; *State v. Comer,*

statutes which provide for an increased punishment upon a second or subsequent conviction for the "same offense," are not in conflict with this amendment to the Federal constitution.[5]

The phrase, "same offense," as used in this amendment, means an offense which is the same both in law and in fact,[6] and includes not only identity in the act constituting the offense charged, but also identity in the form, nature, and effect of the provision therefore.[7]

4. *Same—Construction of State Constitutions.* Under the various state constitutions containing provisions that no person shall be twice put in jeopardy for the same offense, the phrase "same offense" is held to mean "the same criminal act,"[8] and includes not only identity of the act constituting the offense charged, but also identity in the form, nature, and effect of the provision therefore;[9] yet it does not sig-

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157 Ind. 611, 62 N. E. 452; *State v. Height,* 117 Iowa 654, 94 Am. St. Rep. 323, 59 L. R. A. 440, 91 N. W. 935; *Jane v. Com.,* 60 Ky. (3 Met.) 18; *State v. Jackson,* 21 La. Ann. 574; *State v. Carro,* 26 La. Ann. 377; *State v. Anderson,* 30 La. Ann. 559; *Weimer v. Bunbury,* 30 Mich. 208; *State v. Kaub,* 19 Mo. App. 150; *State v. MacQueen,* 69 N. J. L. 527, 55 Atl. 1006; *State ex rel. Lewinsohn v. O'Brien,* 176 N. Y. 261, 68 N. E. 353; *Murphy v. People,* 2 Cow (N. Y.) 815; *Jackson v. Wood,* 2 Cow (N. Y.) 819; *People v. Penhollow,* 42 Hun. (N. Y.) 106; *People ex rel. Kemmler v. Durston,* 55 Hun. (N. Y.) 68, 7 N. Y. Supp. 813; *Livingston v. New York,* 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *State v. Nusan,* 27 N. C. (5 Ired. L.) 351; *State v. Caldwell,* 115 N. C. 803, 20 S. E. 523; *State v. Patterson,* 134 N. C. 618, 47 S. E. 808; *Re Briggs,* 135 N. C. 121, 47 S. E. 403; *Prescott v. State,* 19 Ohio St. 184, 2 Am. Rep. 388; *Territory v. Stroud,* 6 Okla. 111, 50 Pac. 265; *State v. Paul,* 5 R. I. 185; *State v. Keeran,* 5 R. I. 497; *In re Fitzpatrick,* 16 R. I. 60; *State v. Schirer,* 20 S. C. 404; *State v. Atkins,* 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; *State ex rel. George v. Aiken,* 42 S. C. 246, 26 L. R. A. 358, 20 S. E. 221; *State v. Brennan,* 2 S. D. 388, 50 N. W. 625; *Andrews v. State,* 50 Tenn. (3 Heisk.) 172, 8 Am. Rep. 8; *Cox v. State,* 8 Tex. App. 285, 34 Am. Rep. 746; *Pitner v. State,* 23 Tex. App. 366, 5 S. W. 210; *Martin v. Johnson,* 11 Tex. Civ. App. 634, 33 S. W. 306; *Mischer v. State,* 41 Tex. Crim. 220, 96 Am. St. Rep. 780, 53 S. W. 627; *Re McKee,* 19 Utah 235, 57 Pac. 23; *Kimball v. Grantsville City,* 19 Utah 268, 45 L. R. A. 628, 57 Pac. 1; *State v. Hodgson,* 66 Vt. 156, 28 Atl. 1089; *State v. Keyes,* 8 Vt. 57, 30 Am. Dec. 450; *Miller v. Com.,* 88 Va. 623, 15 L. R. A. 444, 14 S. E. 161; *State v. Nordstrom,* 7 Wash. 508, 35 Pac. 382; *Ex parte McNeely,* 36 W. Va. 96, 32 Am. St. Rep. 831, 15 L. R. A. 230, 14 S. E. 436.

[5]See *infra,* part 5.

[6]*United States v. Cashiel,* 1 Hughes 552, Fed. Cal. No. 14,744.

The phrase "same offense," as used in the bill of rights, providing that no person shall be twice put in jeopardy of life or liberty for the same offense, has been construed by some courts to mean "the same criminal act," and by others the contrary has been held. The proper construction seems to be that where the criminal act is at one and the same time an offense against the laws of the state and also against the laws of the United States, the words "same offense" are properly interpreted otherwise than as being equivalent to the words "same criminal act."—*Moundsville v. Fountain,* 27 W. Va. 182, 195, 197.

[7]See post, part 5.

[8]*People v. Stephens,* 79 Cal. 428, 4 L. R. A. 845, 21 Pac. 856.

[9]*State v. Gustin,* 152 Mo. 118, 53 S. W. 421. See *Com. v. Roby,* 29 Mass. (12 Pick.) 496; *Rex v. Vandercomb,* 2 Leach 816.

nify the same offense *eo nominie,* but simply the same criminal act or omission.[10]

5. *Act and Offense Under Two Systems of Law.* We have already seen that by the phrase, "same offense," in the fifth amendment to the Federal constitution, is meant such an offense as is the same both in law and in fact.[11] The question has been raised as to the application of the amendment in those cases in which the same act and set of facts is an offense both under the Federal laws and the statutes of a state; as in the case of a charge of counterfeiting coin of the United States, and also the charge of passing counterfeit money—both of which offenses are punishable, alike, by acts of Congress and state statutes.

Speaking to this point, Mr. Justice McLean, in the case of *Fox v. The State of Ohio,*[12] says: "Each government has defined the crime and affixed the punishment, without reference to the action of any other jurisdiction. And the question arises whether, in such cases, where the Federal government has an undoubted jurisdiction, and state government can punish the same act. The point is not whether the state may not punish an act an offense under the act of Congress, but whether the state may inflict, by virtue of its own sovereignty, punishment for the same act as an offense against the state, which the Federal government may constitutionally punish. If this be so, it is a great defect in our system. For the punishment under the state law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the law of either could be pleaded in bar to a prosecution of the other." But in the later case of *Moore v. The People of Illinois,*[13] it is decided that it is no objection to state legislation that the offender may be liable to punishment under an act of Congress. The court says: "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, or hindering him in the exe-

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[10] *Hirsfield v. State,* 11 Tex. App. 207, 214.
[11] See foot notes 8 to 10, and text going therewith.
[12] 46 U. S. (5 How.) 410, 438, 12 L. ed. 213, 225.
[13] 55 U. S. (14 How.) 13, 20, 14 L. ed. 306, 309.

cution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable."

The last case is in harmony with the great weight of decision which is, as we have seen,[14] to the effect that the fifth amendment to the Federal constitution is not a limitation on the state. Hence if an act is an offense at one and the same time against two systems of law—*e. g.*, against the acts of Congress and state statutes—a trial and conviction under one cannot be pleaded in bar of a trial on an indictment under the other. In accordance with this principle, it has been held that where an act is an offense both against the articles of war and also against the criminal law, a trial and acquittal in one court will not be a bar to a prosecution in the other.[15] There are numerous cases holding to the view that a conviction or acquittal in a proceedings by court-martial will not constitute a bar to proceedings in a criminal court for one and the same offense, and *vice versa*.[16]

6. *Prosecution Cannot Split up a Crime.* The state cannot split up a crime and prosecute it in parts, and a prosecution for any part of a single crime bars any former prosecution based upon the whole or a part of such crime.[17] The rule is well settled that where an offense is a necessary event in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal on a charge of one is a bar for a prosecution on a charge of the other.[18] Thus a conviction of battery bars a subsequent prosecution for an offense included therein;[19] a conviction of assault is a bar to a subsequent

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[14]See foot note 4.

[15]*United States v. Cashiel,* 1 Hughes 552, Fed. Cas. No. 14,744.

[16]*Wilkes v. Dinsman,* 48 U. S. (7 How.) 123, 12 L. ed. 618; *Coleman v. Tennessee,* 97 U. S. 509, 24 L. ed. 1018; *United States v. Clark,* 31 Fed. 715; *In re Fair,* 100 Fed. 151; *United States v. Cashiel,* 1 Hughes 552, Fed. Cas. No. 14,744.

[17]*Jackson v. State,* 14 Ind. 327.

[18]*State v. Smith,* 43 Vt. 324.

[19]*People v. McDaniels,* 137 Cal. 195, 92 Am. St. Rep. 81, 59 L. R. A. 579, 96 Pac. 106.

And a conviction of assault and battery bars a prosecution assault and battery with intent to murder. committed by same act.—*Moore v. State,* 71 Ala. 302; *State v. Hattenbough,* 66 Ind. 223.

prosecution for mayhem committed during such assault;[20] a conviction on a charge of assault and battery is a bar to a subsequent prosecution for an assault to commit murder growing out of the same act;[21] an indictment and acquittal in a charge of criminal libel in the use of certain words contained in a published article, is a bar to a subsequent prosecution for criminal libel in the use of other words contained in the same article, published at the same time and in the same newspaper;[22] and where a person was indicted for having in his possession a forged bank note or bill of the Troy Bank, with intention to alter and pass the same, and to defraud the said bank, he pleaded a former indictment for having in his possession a bank note of the Mechanics' Bank, with intent to alter and pass the same to defraud the Mechanics' Bank, upon which said indictment, he had been found guilty, and judgment thereon was impending; the court held this plea a bar to the proceedings on the indictment for having in his possession the bank note of the Troy Bank, for the reason that the act of passing the several notes was one and the same offense, as much as the act of stealing a number of articles at the same time and place, and the indictment should have specified each note which the prisoner had in his possession. The court alleging that if this had been done, there could not have been several punishments inflicted, and for that reason the offense was "one and the same offense."[23]

It is a well settled principle of criminal law that a person cannot be convicted and punished for two distinct felonies growing out of the same identical act or transaction, where one is a necessary ingredient of the other;[24] that is to say, the law does not permit a single individual act to be divided, so as to make out of it two distinct indictable offenses.[25] Thus, in a case where, by one and the same act, and with the same intent, the accused took a horse, wagon, and harness, the property of A, and two indictments were returned against him, one for stealing the horse, and the other for stealing the wagon and harness, and on a trial under the first indictment he was acquitted, this ac-

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[20]*People v. Defoor,* 100 Cal. 155, 34 Pac. 642.

[21]*People v. McDaniels,* 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 96 Pac. 106. See *Moore v. State,* 71 Ala. 307; *People v. DeFoor,* 100 Cal. 150, 34 Pac. 642; *Moundsville v. Fountain,* 27 W. Va. 182.

[22]*People v. Stephens,* 79 Cal. 428, 4 L. R. A. 845, 21 Pac. 856.

[23]*State v. Benham,* 7 Con. 414. See *King v. Sutton,* Cas. temp. Hardw. 372.

[24]*State v. Cooper,* 13 N. J. L. (1 Green) 361, 25 Am. Dec. 490.

Even though one offense is higher than the other.—*Stevens v. State,* 19 Neb. 647, 28 N. W. 304.

Thus an acquittal of a charge of burning a mill is a bar to a subsequent prosecution for burning any of the contents thereof.—*State v. Colgate,* 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346.

[25]*Drake v. State,* 60 Ala. 43.

quittal was held to be, on plea, a bar to a trial under the second indictment for stealing the wagon and harness.[26] Where a person is prosecuted on an indictment charging burglary, accompanied by actual commission of larceny, and convicted of larceny, only, on a second indictment, charging burglary growing out of the same state of facts, it was held that the first conviction was a bar to a trial under the second indictment;[27] and a conviction of assault to murder bars a subsequent prosecution for robbery committed by means of the same assault.[28] An acquittal on a charge of statutory rape, has been held to bar a subsequent prosecution on a charge of incest with the same girl, although the act relied on in the latter indictment was of a different date.[29] But it is held in *State v. Elder,*[30] that an acquittal on a charge of murder of an unborn child through attempted abortion by the mother, is not a bar to a prosecution for such attempt to produce a miscarriage; in *Wilson v. State,*[31] that a conviction on a charge of larceny is not a bar to a subsequent prosecution under an indictment charging burglariously breaking and entering a store with intent to steal, both being committed at the same time; in *Maim v. Commonwealth,*[32] that a conviction of shooting while committing burglary is not a bar to a subsequent prosecution under an indictment charging the burglary; and in *Teat v. State,*[33] that an indictment for the murder of one person is no bar to an indictment for mortally wounding another party at the same time.

7. *When Constitutional Provision May be Invoked.* A party is not entitled to plead the prohibition of the constitutional provision that no person shall be twice put in jeopardy for the same offense unless the second jeopardy is for the identical offense involved in the first trial,[34] and where a person could not be convicted on a second indictment under evidence which would be sufficient to convict under the first indict-

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[26]*Fisher v. Calm,* 1 Bush (Ky.) 211, 89 Am. Dec. 620. See same principle *State v. Clarke,* 32 Ark. 231; *Williams v. Com.,* 78 Ky. 93; *Triplett v. Com.,* 84 Ky. 193, 1 S. W. 84; *State v. McCormack,* 8 Or. 236.

[27]*State v. Lewis,* 9 N. C. (2 Hawks.) 98, 11 Am. Dec. 741, approved and followed in *Roberts v. State,* 14 Ga. 8; *People v. Smith,* 57 Barb. (N. Y.) 46.

[28]*Herera v. State,* 35 Tex. Cr. 607, 34 S. W. 943.

[29]*State v. Price,* 127 Iowa 301, 103 N. W. 195.

[30]65 Ind. 282, 32 Am. Rep. 69.

[31]24 Conn. 57.

[32]118 Ky. 67, 111 Am. St. Rep. 289, 80 S. W. 438.

[33]53 Miss. 439, 24 Am. Rep. 708.

[34]Thus where a person is tried on a charge of stealing goods, the property of A, this will not be a bar to a subsequent trial on a charge of stealing goods, the property of B, for the reason that the evidence essential to support the first charge would necessarily destroy the second charge, and *vice versa.*—*State v. Williams,* 45 La. Ann. 936, 12 So. 932.

ment, a conviction or an acquittal under the first indictment cannot be interposed by way of a plea of former jeopardy. Thus where a person is indicted on a charge of selling liquor to a minor, and is subsequently indicted and tried for a sale of liquor without license, the evidence required to convict under the second indictment will not be sufficient to convict under the first indictment, and the two offenses charged in the two indictments are not the same offense, although they were committed by one and the same act of sale.[35] In those cases where the evidence is not conflicting, whether or not the transaction is one and the same, is a question for the jury, under a plea of former acquittal.[36]

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[35]*State v. Gapen,* 17 Ind. App. 524, 47 N. E. 35.
[36]*Cook v. State,* 43 Tex. Cr. 188, 96 Am. St. Rep. 854, 63 S. W. 872.