Case No. 15,075.

# UNITED STATES v. FARRING.

{4 Cranch, C. C. 465.}[1]

Circuit Court, District of Columbia. May Term, 1834.

CRIMINAL LAW—EFFECT OF NOLLE PROSEQUI.

A nolle prosequi, without the consent of the defendant, after the jury has been sworn, is equivalent to an acquittal, and may be so pleaded.

{Cited in brief in State v. Champeau, 52 Vt. 315; State v. Primm, 61 Mo. 168.}

Indictment for larceny {against John Farring}.

The defendant had been indicted at this term for stealing two silver dollars, and an order drawn by Hoffman and Stephenson on——for $15. Upon the trial, the order, produced in evidence, was drawn by Hoffmans and Stephenson.

Mr. Key, for the United States, thereupon directed the clerk to enter a nolle prosequi, and the jury was discharged without the consent of the defendant, and a new indictment was found by the grand jury, reciting the order truly. A verdict of guilty was found upon this second indictment, subject to the effect of the nolle prosequi and discharge of the jury, as if specially pleaded. Motion in arrest of judgment for that cause.

Mr. Taylor, for defendant. It is only in cases of inevitable necessity that a jury can be discharged without the consent of the defendant. Wedderburn's Case, Fost. Crown Law, 22g; 1 Chit. Cr. Law, 630.

Mr. Key, contra. It is now brought to a reasonable rule. Wherever it is for the benefit of, or is indifferent to, the prisoner, the jury may be discharged without his consent, as in the case of the sudden illness of a juror or witness, or where a witness is kept out of the way by the prisoner, or other accident. A mistake of a single letter in an indictment is an accident, like the illness of a witness or juror. 1 Chit. 631, note;

2 Johns. Cas. 275, 301; 2 Caines, 100, 304; Cogan's Case, Leach, 167. But this is not an indictment for the same offence. The order could not have been given in evidence upon the former indictment.

THE COURT (THRUSTON, Circuit Judge, contra) arrested the judgment, being of opinion that the discharge of the jury without the defendant's consent was equivalent to an acquittal as to the dollars, and that the defendant might have pleaded it with an averment that the stealing of the dollars and of the order was one act of taking, if such an averment be necessary; which is doubtful, as the indictment charges it to be one act of theft, and upon a general verdict of guilty he would have been sentenced to the penitentiary.

[1] {Reported by Hon. William Cranch, Chief Judge.}