APPENDIX OF NOTES.

NOTE I.

(TO ARTICLE 30.)

HARDLY any legal doctrine is less satisfactory than the one embodied in this Article. The rule has been too long settled to be disputed; but on examining the authorities in their historical order, it appears to me to have originated, like some other doctrines, in the anxiety of judges to devise means by which the excessive severity of the old criminal law might be evaded.

The doctrine as it now stands is uncertain in its extent and irrational as far as it goes. It is, besides, rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances. The first authority on the subject is Bracton, in whose time the more recent doctrine appears to have been unknown. He says:—"Uxor vero furi desponsata, non tenebitur ex furto viri, quia virum accusare non debet nec detegere furtum suum nec feloniam, cum ipsa sui potestatem non habeat, sed vir. Consentire tamen non debet feloniæ viri sui nec coadjutrix esse, sed nequitiam et feloniam viri impedire debet quantum potest. In certis vero casibus de furto tenebitur, si furtum inveniatur sub clavibus uxoris, quas quidem claves habere debet uxor sub custodiâ et curâ suâ. Claves videlicet dispensæ suæ, archæ suæ, et scrinii sui: et si aliquando furtum sub clavibus istis inveniatur, uxor cum viro culpabilis erit. Sed quid si res furtiva in manu uxoris inveniatur, numquid tenebitur vir? Non ut videtur, nisi ei expresse consenserit, vel cum rem ei warrantizaverit cum ipsum vocaverit ad warrantum, et tunc consensisse præsumitur nisi expresse dissentiat, vel nisi de eo præsumatur quod fidelis sit eo quod societatem talis uxoris devitavit in quantum potuit. Item quid erit si uxor cum viro conjuncta fuerit, vel confessa quod viro

suo consilium præstiterit et auxilium, numquid tenebuntur ambo? Imo ut videtur, quia vir potest teneri per se cum sit malus, et uxor poterit esse bona et fidelis et liberari. Item uxor mala per se et vir fidelis. Cum ergo uterque possit esse malus per se et alter eorum bonus, ita poterit uterque eorum, simul et conjunctim, esse malus sicut bonus. Solutio. Non igitur erit in omni casu uxor deliberanda propter consensum, auxilium, et consensum, desicut sunt participes in crimine, ita erunt participes in pœna. Et licet obedire debeat viro, in atrocioribus tamen suis latrociniiis ei non erit obediendum. Poterit quidem vir ligare et tenere, et uxor sponte et non coarta occidere, et ita ut videtur tenetur maleficio uterque. De concubina vero, vel familia domus, non erit sicut de uxore. Ipsi vero accusare tenentur, vel a servitio recedere alioquin videntur consentire."

The effect of this passage is that the wife is not bound to accuse her husband, nor is she to be regarded as accessory after the fact to a theft committed by him merely because she receives the stolen goods, though she may be so regarded if she so conducts herself as to shew actual consent to the theft. The passage does not contain a word about her right to steal with impunity in his presence.

The next authority is Assise (27 Edw. 3), which is in these words:—"Un feme fuit arraine de c̃ q̃ el aver feloñ emble ii s de pain; q̃ disq̃. l le fist per commandemt de celuy qui fuit son baron a cel temps. Et les justices ne voilent prendre pur pite a sa conis, mes pristeront l'enquest; per q̃ fut trove que el' le fit per cohersion de son baron maugre le soe̅ per que el' ala quite, et dit fuit q̃ p̱ command de baron sans auter cohersion, ne serra nul manner de feloñ," &c.

In this case the jury seem to have found actual coercion by the husband. The dictum that the husband's command, he being absent, relieves the wife from guilt is clearly wrong according to more modern authorities. In Fitzherbert's Abridgment (A.D. 1565), Corone, 199, the case in the Book of Assizes is quoted in an abridged form; and Staundforde (A.D. 1583), c. 19, quotes Fitzherbert, but adds a *quære* to the dictum appended to the case, on which Fitzherbert relies. He does not, however, quote the case itself.

Coke (3rd Inst. ch. xlvii. p. 108) says:—"A feme covert committed not larceny if she does it by the coertion of her husband; but a feme covert may commit larceny if she doth it

without the coertion of her husband." He quotes 27 Ass. 40, and Staundforde, but does not say that the bare presence of the husband is to be regarded as coercion, and does not notice the dictum as to the husband's command.

Bacon, upon the maxim "Necessitas inducit privilegium quoad jura privata," observes, "the second necessity is of obedience, and therefore where baron and feme commit a felony, the feme can neither be principal nor accessory, because the law intends her to have no will in regard of the subjection and obedience she owes to her husband." For this he quotes the passage in Staundforde already referred to, and Fitzherbert (Corone, 160), which states, as the effect of a case, in 2 Edw. 3, that eight men and a woman being convicted of felony, and the woman declaring that she was the wife of one of the men, and the jury saying they knew nothing of it, the judge inquired of the bishop. Lord Bacon's proposition thus goes infinitely beyond his authorities.

Dalton (Justice, ch. clvii.) says:—"A feme covert doth steal goods by the compulsion or constraint of her husband. This is no felony in her." And he quotes Fitzherbert and the case quoted by Fitzherbert. He also quotes Bracton in a very unintelligible and fragmentary way, and says that in murder and treason the husband's compulsion does not excuse the wife. As to murder, his authority is Marrow,[1] an author of the time of Henry VII. As to treason, he quotes Fitzherbert (Cor. 130). This passage refers to the case of a woman sentenced to be burnt for coining, respited on the ground of pregnancy, delivered of her child, and becoming pregnant again before she was burnt. The case does not say that she was married at all, and rather implies that she was not.

Hale (1 P. C. 45) says:—"If she (the wife) commit larceny by the coercion of the husband, she is not guilty (27 Ass. 40), and according to some, if it be by the command of her husband, which seems to be law if the husband be present, but not if her husband be absent at the time and place of the felony committed.

"But this command or coercion of the husband doth not excuse in case of treason nor of murder, or in regard of the heinous-

[1] Lambard's "Preface" begins, "To write of the office and duties of a justice of the peace, after H. Marrow," is like "bringing owls to Athens." In *Willes* v. *Bridger*, 2 B. & Ald. 282. Marrow is said to have been a Master in Chancery.

ness of those crimes." He quotes for this the passage in Dalton given above and the cases of Arden and Somerville as to treason, and Lady Somerset as to murder. He goes on: "If the husband and wife together commit larceny or burglary, by the opinion of Bracton (lib. iii. ch. xxxii. s. 10), both are guilty," (Bracton says nothing of the sort,) "and so it hath been practised by some judges. *Vide* Dalt., *ubi supra*, ch. civ." (Dalton does not say so.) "And possibly, in strictness of law, unless the actual coercion of the husband appears, she may be guilty in such a case; for it may many times fall out that the husband doth commit larceny by the instigation, though he cannot in law do it by the coercion, of his wife; but the latter practice hath obtained, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book (2 E. 3, Corone, 160). And this being the modern practice, and, *in favorem vitæ*, is fittest to be followed: and the rather because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy, though I confess this reason is but of small value; for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

"And accordingly in the modern practice where the husband and wife, by the name of his wife, have been indicted for a larceny or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted, merciful judges have used to reprieve the wife before judgment, because they have thought, or at least doubted, that the indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband.

"But this is not agreeable to law, for the indictment stands good against the wife, inasmuch as every indictment is as well several as joint."

This extract probably gives the key to the confusion of the law upon this subject. It was thought hard that a woman should be hanged for a theft for which her husband had his clergy, and accordingly a loophole was devised for married women, similar, as far as theft was concerned, to clergy for men. Hale's remark as to manslaughter shews how incomplete and unsystematic the arrangement was.

Hawkins (1—4) says: If she . . . be guilty of treason, murder, *or robbery*, in company with, or by the coercion of, her husband, she is punishable as much as if she were sole." And Blackstone excepts "treason and *mala in se*, as murder and the like."

The recent cases on the subject are referred to in the Illustrations to the Article and in the foot-note.

Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied.

NOTE II.

(TO ARTICLE 47.)

In *R.* v. *Welham* (1 Cox, C. C. 193), Mr. Justice Patteson, after consulting Baron Parke, said, "We are both clearly of opinion that there can be no inciting to commit a felony unless the party incited knows that the act in which he is to engage is a felony." Upon this Mr. Greaves (1 Russ. Cr. 84, note (*o*)) asks, "How can the guilt of the inciter depend upon the state of mind of the incited? The inciting and the intention of the inciter constitute the offence." As I understand the facts of *R.* v. *Welham*, Welham incited Hood to carry off corn which Hood supposed Welham to have a right to carry off. If this were so, Welham's offence, if any, was an attempt to commit a felony by an innocent agent, and not an incitement to commit a felony, which view would justify the language of the two eminent judges. A. tells B. to put into C.'s tea something which B. supposed to be powdered sugar, but which is really arsenic. This is an attempt by A. to murder C., but it is not an inciting B. to commit murder.

This view is strengthened by *Williams' Case* (1 Den. C. C. 39), in which it was held that to instigate a person to poison another under such circumstances that the instigator would have been an accessory before the fact if the poison had been given, was not an attempt to administer poison.

NOTE III.

(TO ARTICLE 141; MAINTENANCE.)

It is not without hesitation that I have inserted these vague and pratically obselete definitions in this book. As, however, maintenance and champerty hold a place in all the text books, I have not thought it proper to omit all notice of them. A full account of the crimes themselves, of the vagueness of the manner in which they are defined, and of the reasons why they have so long since become obsolete, may be seen in the Fifth Report of the Criminal Law Commissioners, pp. 34–9. The Commissioners observe in conclusion: "Prosecutions for offences comprehended under the general head of maintenance are so rare that their very rarity has been a protection against the disapproval of judges, and those alterations which a frequent recurrence of doubt and vexation would probably have occasioned . . . But although no cases have occurred where the doctrine of maintenance has been discussed in the Courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this have fallen within our own professional observation in the case of prosecutions commenced, although not persevered in." The Commissioners recommend that all these offences should be abolished. The definition of barratry in particular is so vague as to be quite absurd; and the statutory provision as to attorneys practising after a conviction would be utterly intolerable if it had not been long forgotten. I should suppose that there is no other enactment in the whole statute book which authorises any judge to sentence a man to seven years penal servitude after a summary inquiry conducted by himself in his own way.

These offences, as sufficiently appears from the preambles of the various statutes relating to them, are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependants. As long as the verdict of a jury was, more or less, in the nature of a sworn report of local opinion, made by witnesses officially appointed to make such reports, intimidation must have been possible, and, in many cases, easy. Many statutes on this subject[1] are still in force, and the law relating to it is to be found in 1 Hawkins, 454.

[1] 3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 28 Edw. 1, c. 11; 20 Edw. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 5; 32 Hen. 8, c. 9.

The exceptions to the general rule, that a man is not to assist another in a quarrel in which the maintainer has no interest, are so numerous, and, in some cases, so vague (*e.g.* a man may assist his neighbour from charity), that no less vague proposition than the one in the text would faithfully represent the law.

NOTE IV.

(TO ARTICLES 156, 157.)

These offences have, at least in modern times, been made the subject of few, if of any, prosecutions. The excessive severity of the judgment for misprision of treason no doubt escaped notice when forfeitures for felony were abolished. The 33 & 34 Vict. c. 23, takes no notice of misprisions.

The definition of misprision of felony is extremely vague. I have found no authority as to what amounts to a concealment. The obligation to discover treason to a judge or magistrate is mentioned by Hale. In early times, when the offence was commoner and more important, the obligation was very clearly set forth. "Si sit aliquis qui alium noverit inde" (*i.e.* of treason) "esse culpabilem, vel in aliquo criminosum, statim et sine intervallo aliquo accedere debet ad ipsum regem si possit, vel imittere si venire non possit ad aliquem regis familiarem et omnia ei manifestare per ordinem. Nec enim debet morari in uno loco per duas noctes vel per duos dies antequam personam regis videat, nec debet ad aliqua negotia quamvis urgentissima se convertere, quia vix permittitur ei ut retro aspiciat." Bracton, Lib. iii., fo. 118 *b*.

NOTE V.

(TO ARTICLE 172.)

The latter part of this Article is grounded partly upon general considerations and partly upon the case referred to in the Illustrations. Further illustrations of the same principle might easily be given. For instance, the publication of an edition of Juvenal, Aristophanes, Swift, Defoe, Bayle's Dictionary, Rabelais, Brantôme, Boccaccio, Chaucer, &c., cannot be regarded as a crime; yet each of these books contains more or less obscenity for which it is impossible to offer any excuse whatever. I know not how the publication of them could be justified except by the consideration that upon the whole it is

for the public good that the works of remarkable men should be published as they are, so that we may be able to form as complete an estimate as possible of their characters and of the times in which they lived. On the other hand, a collection of indecencies might be formed from any one of the authors I have mentioned the separate publication of which would deserve severe punishment.

In scientific matters the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justice. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. Practically I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures which pure-minded men and women could criticise without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it.

NOTE VI.

(TO ARTICLES 179–184.)

There is a good deal of difficulty in bringing into a clear and systematic form the provisions of the various statutes relating to the suppression of disorderly houses, and especially gaming-houses. I think, however, that the text represents their effect with substantial accuracy.

The matter stands thus. The earliest Act upon the subject now in force is 33 Hen. 8, c. 9, "An Act for Maintenance of Artillery and Debarring of Unlawful Games." This Act was intended to compel people to practise archery by making all other amusements unlawful, and it accordingly forbids by name bowls, quoits, tennis, and various other games, cards and dice, and all other unlawful games prohibited by any of the statutes which it repealed, as well as all other unlawful games to be subsequently invented. The expression "unlawful games" is nowhere defined, unless it means every amusement except archery.

By the 10 Will. 3, c. 23, lotteries were forbidden. By the 12

Geo. 2, c. 28, "the games of ace of hearts, pharaoh, basset and hazard," were declared to be lotteries, and, as well as what we now call raffles, were forbidden under penalties. By the 13 Geo. 2, c. 19, the same course was taken as to a game called passage, "and all other games invented or to be invented with one or more die or dice," backgammon only excepted. By 18 Geo. 2, c. 34, these enactments were extended to "a certain pernicious game called roulet or roly poly," and that game and "any game at cards or dice, already prohibited by law," were prohibited afresh.

The 8 & 9 Vict. c. 109, repeals so much of the Act of Henry VIII. as relates to games of mere skill, and provides that upon any information or indictment for keeping a common gaming-house "it shall be sufficient to prove" the matter stated in Article 183.

This enactment was passed in order to dispose of doubts that apart from its provisions it would have been necessary to prove that the parties played at one of the games specifically prohibited by the Acts of Geo. II., or at one of the games of chance prohibited by the Act of Henry VIII.

NOTE VII.

(General Note to Part V.)

The arrangement of this part, and in particular the composition of Chapters XXI. and XXII., has been the most difficult portion of the task of preparing this Digest. No one who has not made a special study of the subject, can have any adequate notion of the extreme confusion of the authorities, or of the difficulty of extracting anything systematic and definite from a number of scattered hints and isolated decisions upon particular cases—mostly relating to the law of homicide. Upon a full examination of the authorities on this subject it appeared to me that the law contained in them ought to be divided into four parts; namely:—1. Cases in which it is not criminal to inflict death; or bodily harm intentionally. These are the execution of legal sentences, keeping the peace, prevention of crime, self-defence, the use of lawful force, consent and accident. The expression "lawful force" is unavoidably vague. To enumerate every case in which the use of personal violence may be justified would be inconsistent with the scheme of this work. It would, for instance, be going beyond the limits of criminal law to enquire

into the extent of the right of correction vested in parents, masters, captains of merchant ships, &c., or of the right of the owner of a personal chattel to take it away from a trespasser, or to try to enumerate all the cases in which civil and criminal process may be executed by the use of force, and the conditions necessary to make it legal. I have accordingly confined myself to the general principles stated in Articles 200–201.

2. Cases in which the infliction of death or bodily harm by omissions is or is not criminal. Injuries caused by the omission to do an act which the negligent person is under a legal duty to do stand on the same footing as injuries caused by unlawful acts. It is, therefore, necessary to define the commoner and more important of the legal duties which tend to the preservation of life. I have, therefore, deduced them in Chapter XXII. from the different decisions in which a violation of them has been held to occur. Of course the chapter does not contain an exhaustive list of all the duties which might tend to the preservation of life under particular circumstances, though I hope it notices the most important of them.

3. Cases relating to homicide generally and apart from the distinction between murder and manslaughter. Such are the point of time at which a child becomes a human being, the degree of connection between an act and the death caused by it necessary in order to enable us to say that the agent has killed the deceased, and the case in which the act done is not the sole cause of death. Thus, if an unborn child receives an injury of which it dies before it is fully born, the infliction of the injury cannot be either murder or manslaughter. If it dies after it is fully born the infliction of the injury may be either justifiable homicide, accidental homicide, manslaughter, or murder, according to circumstances. This makes it possible to enumerate the cases in which homicide is unlawful, and so to give a specific meaning to the expression "unlawful homicide."

4. The definition of malice aforethought. Unlawful homicide must be manslaughter at least, and may be murder if it is accompanied by malice aforethought; and, after dealing with this, the transition to the less serious bodily injuries, felonious or otherwise, is easy.

When this division of the subject is carried out it looks simple; at least I hope so; but any one who will try the

experiment of referring to the authorities will believe me when I assert that it cost me weeks of thought and labour to put the matter in this shape. I believe, however, that it is now not very incomplete.

The table on p. 377 shews, I think, that every imaginable kind of homicide has been considered, and has been classified as lawful or unlawful in some part or other of Chapters XXI., XXII., and XXIII., and if this be so the definitions of murder and manslaughter must also be complete.

This table gives seven distinct kinds of homicide, as follows:—

1. Homicide by an act accompanied by a lawful intention to kill or hurt (Chapter XXI.).

2. Homicide by an act accompanied by an unlawful intention to kill or hurt (Article 222 (*a*)).

3. Homicide by an act in itself lawful, and not accompanied by an intention to kill or hurt (Article 210).

4. Homicide by an act in itself unlawful, but not accompanied by an intention to kill or hurt (Article 222 (*c*)).

5. Homicide by an omission to discharge a legal duty amounting to culpable negligence (Chapter XXII., Article 222 (*b*)).

6. Homicide by an omission to discharge a legal duty not amounting to culpable negligence (Article 211).

7. Homicide by an omission to do an act not amounting to a legal duty (Article 212).

Of these Nos. 1, 3, 6, and 7 are not unlawful in the sense of being criminal. Nos. 2, 4, and 5 are unlawful. Every act falling within these definitions must be manslaughter at least, and may be murder if it is accompanied by malice aforethought, as defined in the next chapter, and is not provoked.

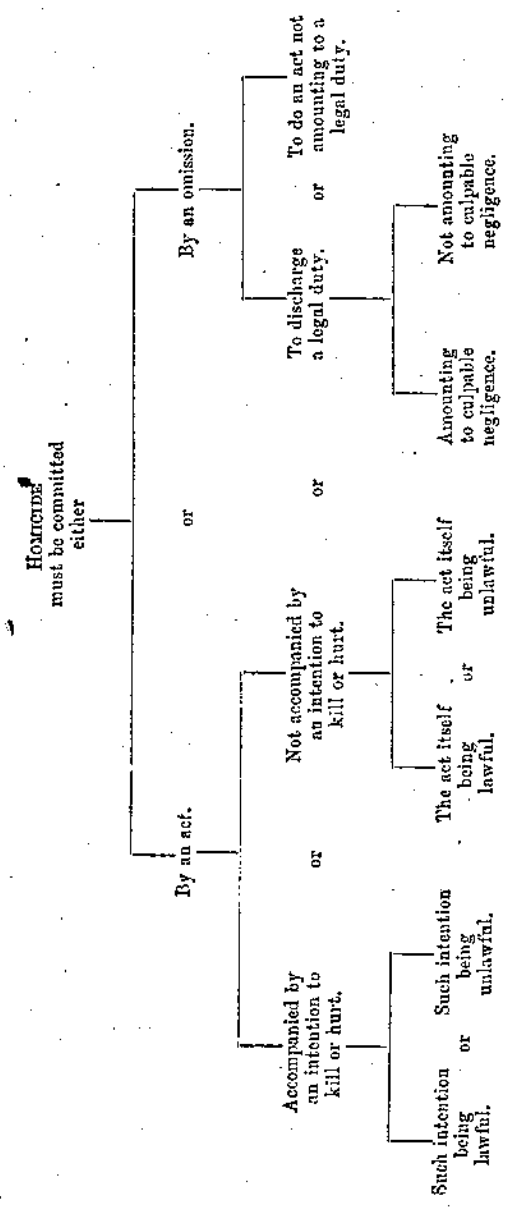
Unless some kind of homicide can be suggested which is not comprehended in one or other of these classes, the subject is exhausted in these chapters.

NOTE VIII.

(Article 223.)

Definition of Murder and Manslaughter.

This definition represents the solution at which I have arrived after much consideration of one of the most difficult


Homicide must be committed either
By an act.
or
By an omission.
Accompanied by an intention to kill or hurt.
or
Not accompanied by an intention to kill or hurt.
Such intention being lawful.
or
Such intention being unlawful.
The act itself being lawful.
or
The act itself being unlawful.
To discharge a legal duty.
or
To do an act not amounting to a legal duty.
Amounting to culpable negligence.
Not amounting to culpable negligence.

problems presented by the criminal law—the problem of giving in a short compass the result of a great number of decisions and statements by authoritative writers upon the subject of murder.

I do not propose in this note to examine the history of the law on this subject, or to enter into any inquiry as to its merits and demerits. I propose simply to shew that it is stated correctly in the text. It will be sufficient for this purpose to shew, first, that the definition which I have given coincides with the theory laid down by the authorities on the subject; and secondly, that all the points decided by the various cases relating to any form of homicide are comprehended in what I have said on the subject in the different Articles contained in Chapters XXI.—XXIV. both inclusive, for the various decisions in question range over all the subjects treated of in those chapters indiscriminately. The first of these points I shall try to establish by shewing that my definition of murder and manslaughter respectively will be found upon examination to be equivalent to what is stated in Coke's 3rd Institute, Chapters VII. and VIII., 1 Hale's Pleas of the Crown, pp. 411–502 (Chapters XXXI.—XLII. both inclusive), and Foster's Discourse on Homicide (Crown Law, 255–337). The existing law on the subject is founded mainly upon these works, and the almost innumerable decisions bearing upon the subject are all applications of the theory which is there laid down. The decisions have been collected more or less fully, and arranged in a more or less satisfactory way, by various writers, but for every practical purpose the collection contained in Russell on Crimes is sufficient, though in point of arrangement it is, I think, inferior to the older work of East.[1] It fills 212 pages (640–852)

[1] Only two decisions on the subject of the law of murder of any great importance were given between 1865, when the 4th edition of Russell was published, and 1876, when the 5th edition was published. These decisions not having been reported in the ordinary law reports, have not been noticed in the last edition of Russell. They are the cases of *R.* v. *Allen and Others*, the Fenians, tried at Manchester for the murder of the policeman Brett, in 1867, and the case of *R.* v. *Desmond and Others*, for killing people by blowing up the wall of Clerkenwell Prison, in 1868. Neither of these cases is reported in the common reports. I have quoted what was said by Lord Chief Justice Cockburn in *Desmond's Case* in Art. 223, Illust. (8), and I have reprinted in the note next following from the *Times*, the correspondence which passed between the counsel for the prisoner and Lord (then Mr. Justice) Blackburn, in *R.* v. *Allen and Others*. Though not in form it constitutes in fact an argument and a written judgment on a very important point. The difference of ten pages between the collection of cases in the 4th and the collection in the 5th

of the first volume of the 5th edition, and 231 pages (667–898) of the 4th edition, to which I refer.

After establishing the correctness of the general definition in the manner already described, I will give an analysis of the collection of cases in Russell, and show how each group of cases is accounted for in the text of the Digest. The intricacy, confusion, and uncertainty of this branch of the law may be traced to the statute 23 Hen. 8, c. 1, s. 3, which took away benefit of clergy in cases of "wilful murder of malice prepensed," and which thus created the necessity of preserving the expression, "malice prepense," and at the same time explaining it away. Coke endeavoured to effect this by the doctrine of constructive or fictitious malice, of which, if not the author, he was the most conspicuous expounder, and he shewed in his exposition of it that utter incapacity for anything like correct language or consecutive thought which was one of his great characteristics. Hale amplifies Coke, Foster rationalizes Hale, and the judges have, in an unsystematic occasional way, worked out, bit by bit, the result recorded in the text.

According to Coke malice aforethought is the criterion by which murder is distinguished from manslaughter. Malice may be either express or implied.

[1] "Malice prepensed is where one compasseth to kill, wound, or beat another and doth it *sedato animo*."

[2] "Malice implied is in three cases:—

"First, in respect of the manner of the deed, as if one killeth another without any provocation of the part of him that is slain, the law implieth malice.

"Second, in respect of the person slain. As if a magistrate or known officer, or any other that hath lawful warrant, and in doing or offering to do his office or to execute his warrant, is slain, this is murder by malice implied in law, as the" [3] person killed is "the minister of the king."

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edition of Russell is owing to the circumstance that in the 4th edition a large number of cases are referred to twice over, once in order to shew what degree of provocation reduces murder to manslaughter, and again in order to shew what amount of provocation justifies a charge of manslaughter as distinguished from murder. A cat is produced twice, first to shew the difference between tigers and cats, and again to shew the resemblance between cats and tigers.

[1] 3rd Inst. 51.

[2] Ibid. 52.

[3] The sentence here is not even grammatical.

"Third, in respect of the person killing. If A assault B to rob him, and in resisting A killeth B (*i.e.* if B resists and A kills him) this is murder by malice implied, albeit he" (A) "never saw or knew him" (B) "before."

These passages, overloaded, as Coke's manner is, with a quantity of loose rambling gossip, form the essence of his account of murder.

Hale, who arranges his matter more systematically (though he also is exceedingly confused), [1] adopts Coke's theory in slightly different language. "Such a malice, therefore, that makes the killing of a man to be murder is of two kinds: 1. Malice in fact, or 2, malice in law, or *ex præsumptione legis*."

"Malice in fact is a deliberate intention of doing some corporal harm to the person of another."

"Malice in law, or presumed malice, is of several kinds, viz., 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person killed, viz., a minister of justice in the execution of his office. 3. In respect of the person killing." (As to which he [2] afterwards repeats Coke in an abridged form.)

Manslaughter, Coke [3] tells us (in the middle of a bewildering chapter about homicide in general) is homicide, "not of malice forethought" [but] "upon some sudden falling out."

Manslaughter is treated by Hale in a manner so meagre and yet so confused, that no notion of it can be obtained except by reading through Chapters XXXVIII.—XL., and trying to make sense of them. Hale's whole definition of the offence is in these words, "Manslaughter, or simple homicide, is the voluntary killing of another without malice express or implied."

These definitions are open to the remark that the definition of express malice includes all the three cases of implied malice.

Express malice, means the deliberate intentional infliction of bodily harm. Malice is implied if the act is done without provocation, or in resisting on officer of justice, or in committing a crime. But in each of these cases the infliction of bodily harm must be intentional, and there is no reason why in each of them it should not be deliberate.

[1] 1 Hale, P. C. 451.
[2] Page 465.
[3] 3rd Inst. 55.

Thus the distinction between express and implied malice is a distinction without a difference.

It has involved the whole subject in an obscurity from which it can never be rescued except by legislation, though I think the way in which it is stated in the text is correct, and may contribute to dispelling the confusion.

Coke's theory, however, and that of Hale may be exhibited in the following propositions:—

1. Unlawful killing by any sort of premeditated intentional personal violence is murder.

2. Premeditation is to be presumed if the violence is intentional and unprovoked.

3. Unlawful killing by unpremeditated intentional personal violence is murder if the violence is employed in the commission of a crime or in resistance to lawful authority.

4. Unlawful killing by unpremeditated intentional violence provoked is manslaughter.

These four propositions may be also stated thus—so as to shew their connection:

Unlawful killing by any sort of intentional personal violence, is murder, unless such violence is used "upon a sudden falling out," constituting provocation to the offender, but neither the exercise of force by an officer of justice against an offender, nor resistance to the offender by a person against whom a crime is attempted, constitutes such a provocation, and killing in such cases is murder.

That this proposition is the equivalent of the four propositions given above is thus proved:

[1] All intentional violence must be either provoked or unprovoked.

All intentional violence must be either premeditated or unpremeditated.

[1] This may be expressed thus in a tabular form:—

Intentional Violence must be	Premeditated. or	Unpremeditated.
Provoked ... ... or	Murder by proposition 1.	Not murder by proposition 4, except in cases under proposition 3.
Unprovoked ...	Murder by proposition 1.	Murder by proposition 2.

Killing by premeditated intentional personal violence is murder by (1).

Killing by unpremeditated, unprovoked intentional personal violence is, by (2), equivalent to killing by premeditated intentional personal violence, and is therefore murder. Therefore all killing by intentional personal violence is murder, unless such violence is both provoked and unpremeditated.

By (3) killing by intentional personal violence unpremeditated, and provoked only by the exercise of lawful force in the ways mentioned, is murder.

Therefore the four propositions are equivalent to the one last stated.

The legal character of unintentional killing was held by Coke and Hale to depend on the character of the act by which death was caused. If the act was unlawful the offence was murder. If lawful the death was killing by misadventure, which, in Hale's time, seems to have covered, at all events in part, the ground now occupied by manslaughter by negligence. As to this Hale says:—[1] "Though the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, though it was not his crime, but his misfortune, yet, because the King hath lost his subject, *and that men may be more careful*, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed," &c.

Upon the whole, the law as to unlawful homicide, as understood by Coke and Hale (the effect of what they say on justifiable homicide is given in Chapter XXI.) may be summed up as follows:—

Murder is unlawful killing

(*a.*) by any intentional personal violence not inflicted upon a sudden falling out;

(*b.*) by any unintentional personal violence inflicted in an unlawful act.

Manslaughter is killing by any intentional personal violence inflicted upon a sudden falling out, provided that if a man attempting to commit a crime upon another is resisted, and kills the person resisting, or if a man resists an officer of justice in the exercise of his duty, and kills him, the offence is murder, and not manslaughter, although there is something which may be described as a sudden falling out between the parties.

[1] 1 Hale, P. C. 477.

The following theory was collateral to this definition, and was supposed to be its basis:—

In all murder there is malice aforethought. In murder as defined in (*a.*) there is express malice aforethought if the circumstances shew premeditation. There is implied malice aforethought if the act was done suddenly, and without provocation.

In murder as defined in (*b.*), and in the proviso to the definition of manslaughter, the malice is always implied.

In manslaughter there is no express malice aforethought, and it is not thought proper to imply it.

These explanations shew the true nature and real use of the expression "malice aforethought"—a mere popular phrase unluckily introduced into an Act of Parliament, and half explained away by the judges. It throws no light whatever on the nature of the crime of murder, and never was used in its natural sense of premeditation. On the other hand, it served as a sort of standing hint at the kind of definition which was wanted, for it was equivalent to saying that there were two degrees of homicide—homicide with premeditation, or other circumstances indicating the same sort of malignity; and homicide provoked by a sudden quarrel, or accompanied with other circumstances indicative of a less degree of malignity.

Foster's discourse on Homicide is little more than an amplification of this thesis. He goes through all the principal cases which have been decided in his time, and compares them with the theories of Hale and Coke, drawing the conclusion that malice means "that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and fatally bent upon mischief;"[1] a principle more shortly expressed by Holt, L.C.J., in the words, "He that doth a cruel act voluntarily doth it of malice prepensed."[2]

This principle gives its due prominence to a distinction which appears to have been quite unknown to Coke, though it had attracted the attention of Hale, and is, one would think, obvious enough in itself, the distinction, namely, between causing death

[1] Foster, 256.

[2] *R.* v. *Mawgridge*, Kelyng (3rd ed.), 174. This judgment contains an admirable summary of the law of murder and manslaughter as it was understood in the beginning of the eighteenth century.

unintentionally by an act likely to cause death, and causing death unintentionally by an act unlikely to cause death.

According to Coke [1] and Hale [2] a settled design to beat a man makes killing him by such beating murder. Hale, however, seems to doubt whether, if the beating was moderate, the killing might not be manslaughter, and mentions [3] one case in which, a soldier having killed a woman who abused him by throwing a broomstick at her, the judges were divided on the question whether the act was murder or not, and recommended a pardon. This view of the matter is developed at length by Foster, who discusses many cases in connection with it, and may be regarded as having laid the foundation of the modern doctrine on the subject, which has since his time been recognised in a vast number of cases, that the general presumption of malice which arises from the fact of killing is rebutted if it appear that the means used were not likely to cause death.

Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence, by confining it to cases in which the unintentional violence is offered in the commission of a felony. This rule has in modern times had a singular and unexpected effect. When Coke and Hale wrote, the infliction of hardly any bodily injury [4] short of a maim was a felony. Cutting with intent to disfigure was made felony by the Coventry Act; shooting was made felony by what was called the Black Act; and by later statutes it has been provided that the intentional infliction of grievous bodily harm in any way whatever shall be felony (see Article 236 (*a.*)). The result is that Foster's rule as to the intent to do grievous, as distinguished from minor, bodily harm being essential to malice aforethought now rests on statutory authority, for no one can intentionally inflict on another grievous bodily harm without committing a felony, and to cause death by a felonious act is murder.

The law as to homicide by omission is more modern, but closely follows the lines of the older part of the law. The authorities on it will be found in the Illustrations.

I now pass to the cases, and propose to shew, by going

[1] 3rd Inst. 50.
[2] 1 Hale, P. C. 472.
[3] 1 Hale, P. C. 456.
[4] Cutting out the tongue, or putting out the eyes, was felony by 5 Hen. 4, c. 5.

through the collection contained in 1 Russell, Cr. pp. 667–898, that all the points which have been decided are included in one part or another of the Digest—I hope in a more intelligible order.

These cases fill the first three chapters of the Third Book, which chapters are entitled :—

1. Of murder; pp. 667–782.

2. Of manslaughter; pp. 783–882.

3. Of excusable and justifiable homicide; pp. 883–898.

Pages 667, 668 contain extracts from the text writers as to malice; as to which see the earlier part of this note, also the rule of evidence embodied in Article 230.

669. Provocation no answer in cases of express malice. Art. 225. Party killing must be a free agent. See Article 27

670–674. Cases as to the time when a child becomes a human being. Art. 218.

Means of killing :—

675. If probable consequence of act is death, it is murder Art. 223 (*b.*), (*c.*), and see Illustration (5).

676. Forcing a person to kill himself is murder. Art. 220 (*c.*).

677. Harsh treatment of an apprentice. Art. 221 (*b.*). Illustration (1).

678–686. Cases on causing death by omission to supply necessaries, and on the extent of the legal duty of doing so. See Chapter XXII.

687. Savage animals. Art. 216.

688–699. Homicide by medical men. Art. 217.

699. Lord Hale's *quære* as to infection. Art. 221, note (2).

700. Year and a day. Art 221 (*a.*).

700–702. Treatment of wounds being the immediate cause of death. Art. 220 (*a.*).

702, 703. Killing a person labouring under a disease. Art. 220 (*d.*).

703. Poisoning (superfluous).

703–706. Suicide and accessories to suicide. Art. 227.

706–710. Accessories before and after the fact. See Chapter IV.

710. Punishment. Art. 231.

Petit treason abolished (superfluous).

The general part of Chapter I. is followed by seven sections, as follows :—

SECT. 1. *Provocation.*—Pages 711–727.

Pages 711–717. Words, &c., no provocation. Art. 224 (*f.*).

712. Act of killing without adequate provocation a form of malice. Art. 223.

Words of menace. Art. 224 (*f.*).

713–716. Provocation by assault. Art. 224 (*a.*). And see Art. 225.

716–727. Intention to kill or do personal bodily harm is one test as to murder and manslaughter. Art. 223 (*a.*).

Much of this is to the same purpose as pp. 713–716. Art. 225.

SECT. 2. *Cases of Mutual Combat.*—Pages 727–732.

Page 727. Deliberate duelling is murder. Art. 207.

730–732. Major Oneby's case (and others); provocation. Art. 225.

SECT. 3. *Resisting Officers of Justice executing Legal Process.*—Pages 732–738.

Art. 223 (*d.*).

SECT. 4. *Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act.*—Pages 739–746.

Pages 739–742. Cases in which one person was killed by

[1] This strange arrangement is suggested by the circumstance that a woman indicted for murder may be convicted of concealment. This is as bad a specimen of arrangement as the introduction of the plea of *autrefois acquit* under the head of burglary. It is fair to say that the credit of these additions is due to the late Sir William Russell, and not to his editors. After all, it is not more surprising than the arrangement (if such it can be called) of the Pandects.

injury designed for another, Art. 223 (*a.*) and (*b.*); and cases in which death was caused by an injury not intended to cause death, but inflicted in the commission of a felony. Art. 223 (*c.*).

742–746. Cases in which all the persons joining in a common enterprise are responsible for the act of any one. See Chapter IV. on accessories.

SECT. 5. *Killing by a lawful act criminally or improperly performed.*—Pages 747–752.

A "lawful act criminally performed" is a contradiction in terms. If a police officer arrests a thief who neither resists nor runs away by giving him a violent blow on the head, it is as absurd to call the blow a "lawful act criminally performed," because the arrest might have been lawfully made, as it would be to call picking a pocket a lawful act criminally performed, because the thief had a right to walk along the street without picking pockets.

A lawful act improperly performed can mean only culpable negligence in the performance of a lawful act. The cases in this section are accordingly superfluous. All of them fall directly under the definitions of murder or manslaughter given in Articles 223, 224. Thus, for example, in *R.* v. *Smith* (p. 749), A shoots B dead for pretending to be a ghost and frightening people. This was held to be murder. It would fall under Articles 222 and 223, thus:—It was unlawful homicide, because the deed was done by an act intended to cause bodily harm not falling within any of the exceptions specified in the Article. The homicide was with malice aforethought, because the intention was (if not to kill) at least to cause grievous bodily harm.

In *R.* v. *Hopley* (p. 751) a schoolmaster was convicted of manslaughter for flogging a boy with extreme severity. Here the homicide was unlawful, because the act which caused death was intended to cause bodily harm, and was not within the exceptions (see particularly Art. 204). If the prisoner had been indicted for murder (as Mr. Greaves thinks he ought to have been, and I agree with him), the question for the jury would have been whether or not his acts were such as, according to common knowledge, would cause death or grievous bodily harm.

SECT. 6. *Indictment, Trial, &c.*—Pages 753–774.

This is foreign to my purpose.

Pages 774–780. Concealment of the birth of children. See Article 235.

SECT. 6. *Judgment and Execution.*—Pages 780–782.

As to judgment, see Articles 231, 232.

Execution is part of the law of procedure; but see Art. 231 (note 2).

Chapter II. relates to manslaughter; pp. 783–882.

Page 783. The page begins by defining manslaughter (see Art. 223).

The rest of the page is about accessories in manslaughter (see Art. 229).

The rest of the chapter is divided into six sections:—

Sect. 1. Provocation; pp. 784–790.
„ 2. Mutual combat; pp. 790–798.
„ 3. Resistance to officers of justice, &c.; pp. 798–848.
„ 4. Killing by an unlawful act; pp. 849–856.
„ 5. Lawful act improperly performed; pp. 856–880.
„ 6. Indictment and judgment; pp. 880–882.

The greater part of the matter of these six sections repeats what is contained in the chapter on murder.

SECT. 1. *Provocation.*—Pages 784–790.

This adds nothing to what is said on the same subject in pp. 711–727. See Articles 224–6.

Some cases are referred to in this section which contributed to the establishment of the general rule that to cause death by the infliction of injury intended to cause slight harm only is manslaughter, *e.g.*, A drowns a pickpocket, meaning only to duck him (*Fray's case*, p. 787); A seeing his son bleed from a fight with another boy runs after the other boy and gives him a slight stroke with a stick, which happens to kill him (787; and See Foster, 294, for a careful discussion of the case).

SECT. 2. *Mutual Combat.*—Pages 790–798.

Repeats 727–737. See Art. 200 (*d.*).

Some of the cases referred to in this section relate also to the

case of one person being killed by a blow intended for another. See Art. 223 (*a.*).

SECT. 3. *Resistance to Arrest by Officers, &c.*—Pages 798–848.

Nearly the whole of this section is made up of reports of cases on the authority of different persons to arrest in particular cases, on notice, &c. This seems to me to belong rather to the law of civil and criminal procedure than to the criminal law. One point of importance is, however, noticed in Art. 224 (*c.*).

SECT. 4. *Killing in an unlawful, criminal, or wanton act.*—Pages 849–856.

Page 849. One person killed by violence intended for another. See Art. 223.

849–854. Negligent acts. Chapter XXII.; and see Articles 222, 223.

855, 856. See Art. 210 (*iii*).

SECT. 5. *Killing by a lawful act improperly performed.*—Pages 856–880.

Pages 856–864. These are cases of excess in the use of force when some force would have been lawful. See Art. 201.

864–880. These are all cases of negligence in doing acts which are or may be dangerous. Art. 216. Pages 877, 878 contain cases relating to the law as to the effect of joint negligence, Art. 220 (*e.*); and at 864 are cases bearing on the degree of remoteness consistent with an act being the cause of death. Art. 219.

SECT. 6. *Indictment and Judgment.*—Pages 880–882.

As to the punishment for manslaughter, see Art. 232. The rest is omitted as belonging to the subject of procedure.

CHAPTER III. EXCUSABLE AND JUSTIFIABLE HOMICIDE.—Pages 883–898.

As the distinction between excusable and justifiable homicide is now unimportant (see 24 & 25 Vict. c. 100, s. 7), I have not noticed it.

Page 884, Sect. 1. Excusable homicide by misadventure, pp. 884–8. See Art. 210.

885–888. Gives over again what is said in 861, &c., as to manslaughter by negligence.

888–892. Homicide in self-defence. See Art. 200.

893–895. Justifiable homicide. Chapter XXI.

All the cases referred to in Russell on Crimes are thus disposed of in the different Articles of the Digest. Nothing short of studying the contents of these 200 pages can give any one any notion, either of the amount of patient thought and sound good sense which have been employed in the decision of particular cases by many generations of judges, or of the immense amount of material which has been gradually accumulated by reporters, or of the helpless bewilderment, the utter incapacity to take general views, or to see the relation to each other of different principles, or to arrange an intricate question according to the natural distribution of the subject, which characterizes English text writers. The cases above referred to, as they stand in Russell, are like the stores at Balaklava, in the winter of 1854–5. Every thing is there, nothing is in its place, and the few feeble attempts at arrangement which have been made serve only to bring the mass of confusion to light.

NOTE IX.

(TO ARTICLES 224 (*c.*), 225.)

The following correspondence was published in the *Times* of Nov. 21, 1867. It refers to the case of *R.* v. *Allen and Others*, convicted at the Manchester Special Commission of the murder of Brett, a police officer, whom they shot in an attempt to rescue a Fenian prisoner from a police van in Manchester. There is no legal report of the case so far as I know, but, as will be seen, the letter of the prisoner's counsel, and the reply of Lord (then Mr. Justice) Blackburn are substantially an argument and a judgment on a matter of very great importance. I have, therefore, republished them from the *Times* with Lord Blackburn's permission.

STATEMENT submitted to Mr. JUSTICE BLACKBURN and Mr. JUSTICE MELLOR.

"REGINA *v.* ALLEN AND OTHERS.

"Upon the trial of Allen and Others for the murder of Sergeant Brett, two points of law arose, under the following circumstances:—

"On the morning of the 11th of September last, two men,

who turned out afterwards to be Kelly and Deasy, were arrested by a Manchester policeman, as he alleged, under section 216 of the Manchester Police Act (7 & 8 Vict. c. 40), which enacts that it shall be lawful for any constable belonging to the police force of the borough to take into custody, without a warrant, all loose, idle or disorderly persons whom he may find disturbing the public peace, or in his own view committing an offence against this Act, or whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor, or breach of the peace, or to instigate or abet any such breach.

"The two men, who gave the names of White and Williams, were taken before a magistrate on the 11th, and remanded until the 18th by a warrant, which stated the charges against them to be, not for suspicion of felony, on which charge they were arrested, but for 'felony,' and omitted to specify what felony, or other offence they were charged with. They were brought up again on the 18th, when no evidence whatever was given upon the charge on which they were alleged to have been arrested, but an inspector of detectives from London, who stated he had a warrant against Kelly for treasonable practices, alleged to have been committed in Ireland, and a constable from Ireland, who was stated to have a similar warrant against Deasy, appeared, and on their application, without the production of either of the warrants, which, in fact, were not then backed as the statute required, the prisoners were again remanded for a week.

"No warrant for such second remand was produced upon the trial, but it was stated that a warrant had been signed, a copy of that signed on the 11th inst., and had been destroyed by the police after the escape of the prisoners.

"Kelly and Deasy were then placed in the prison van, for the purpose of being taken to prison, and on the way the van was attacked, the prisoners rescued, and Brett killed.

"The two questions were: 1st, whether or not Kelly and Deasy were in legal custody; and 2nd, if they were not in legal custody, whether the crime of killing Brett, in the act of rescuing them, amounted to murder or manslaughter.

"As to the first point, it would seem (1st) that the magistrate had no jurisdiction to commit for felony, no charge of felony having been made; and (2nd) that the magistrate had no

jurisdiction to entertain the charge of treasonable practices committed in Ireland, or to remand the prisoners upon such a charge. By the 11 & 12 Vict. c. 42, s. 22, justices are empowered to take the examination of witnesses against persons who are brought before them charged with an offence alleged to have been committed in any county or place within England and Wales wherein they have not jurisdiction. By sect. 2 of the same Act they are empowered to issue their warrant to apprehend any one within their jurisdiction charged with having committed any crime or offence on the high seas, or in any creek, harbour, &c., or any 'crimes or offences committed on lands beyond the seas for which an indictment may legally be preferred in any place within England or Wales.' By sect. 11, where an English warrant is backed in England, the offender, when apprehended, may be taken before the justice who issues the warrant, or, if so directed by the justice backing the warrant, before such last-mentioned justice, or any other justice of the same county or place; but by sect. 12, where an Irish warrant is backed in England, the offender must be taken before the justice who granted the warrant, and there is no power to take him before the magistrate who has backed it. It would seem, therefore, that in this case the proper course would have been, in the case of Deasy, at least, for the magistrate to have backed the Irish warrant, and for the prisoner to have been taken, under the authority of the warrant so backed, to Ireland, and that the magistrate had no jurisdiction to examine any witnesses against Deasy, or to remand him upon the charge of felony.

"Thirdly.—It is laid down in Coke's Second Institute, p. 591, when speaking of prison breaking, that a *mittimus* must 'contain the cause, but not so certainly as an indictment ought, and yet with such convenient certainty as it may appear judicially that the offence (prison breaking), *tale judicium requirit* as *pro altâ proditione*, viz. *in personam domini regis, &c.*, or *pro feloniâ*, viz., *pro morte talis*, &c.,' and he lays it down that a *mittimus pro feloniâ* generally is bad. So again, Hale (P. C. vol. ii. p. 122), says that a *mittimus* 'must contain the certainty of the cause, and therefore if it be for felony, it ought not to be generally *pro feloniâ*, but it must contain the especial nature of the felony briefly, as for felony for the death of J. S., or for burglary in breaking the house of J. S., &c., and the reason is

because it may appear to the Judges of the King's Bench upon an *habeas corpus* whether it be a felony or not.' Hale, however, adds, that he does not think the absence of such particularity would make the warrant void. It is worthy of notice that in the forms of remand given by Chitty in his Criminal Law, vol. iv. pp. 33, 116, and in the form given in the 11 & 12 Vict. c. 42 (Q. 1), the felony is specifically described.

"The second point, which appears to be of the greater importance, looking at the actual direction to the jury, and to the fact that they were not asked to find the existence, contents, or form of the warrant, is whether, assuming the detention of one or both of the prisoners to have been illegal, the killing of Brett amounted to murder.

"The first case on the subject is that of Sir H. Ferrers (Cro. Car. 371) who was arrested for debt, and thereupon Nightingale, his servant, in seeking to rescue him, as was pretended, killed the bailiff, 'but because the warrant to arrest him was by the name of Henry Ferrers, Knight, and he never was a knight, it was held by all the Court that it was at variance in an essential part of the name, and they had no authority by that warrant to arrest Sir Henry Ferrers, Baronet, so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder.' This case is also reported by Sir W. Jones (p. 346), where it is said to have been held not to be murder either in the servant or in the prisoner, because the warrant was not good.

"The next case is that of *Hopkin Hugget*, which was tried in 1666, and is best reported in Kelyng (p. 59). In that case, Hugget and three others pursued three constables who had impressed a man, and demanded to see their warrant. The constables showed a paper which the prisoner said was no warrant, and thereupon they drew their swords, and Hugget killed one of the constables. Of the twelve judges eight delivered their opinion that this was no murder, but only manslaughter, and they said that if a man be unduly arrested or restrained of his liberty by three men, although he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends, but strangers also, for common humanity's sake, as my Lord Bridgman said, to endeavour his rescue; and if in such endeavour of rescue, they kill any one, that is no murder, but only manslaughter. The four other judges held it

murder, and thought the case in question to be much the stronger, because the party himself who was impressed was quiet and made no resistance, and they who meddled were no friends of his or acquaintances, but mere strangers, and did not so much as desire them which had him in custody to let him go. Although all the Judges of the King's Bench thought it murder, they conformed to the opinion of the other eight, and gave judgment of imprisonment for eleven months.

"In *Reg.* v. *Mawgridge*, which was tried in 1707 (Kelyng, 136), the Chief Justice alludes to *Hugget's Case* as having settled the law upon the point.

"In *Tooley's Case* (2 Lord Raymond, 1296), which was tried in 1710, Ann Dakin was in custody of one Bray, when the prisoners, who were strangers to Dakin, assaulted Bray, but withdrew. They afterwards assaulted Bray again, after the woman had been locked up, and killed one Dent, whom Bray had called to his assistance. One of the prisoners gave the stroke, the two others were aiding and abetting. Seven of the twelve judges held this to be manslaughter, and five held it to be murder, one of the five thinking that the constable had authority. Those judges who held the offence to be manslaughter only, so held on the opinion that the prisoners had sufficient provocation, for if, say they, one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done under a colour of justice, and where the liberty of the subject is invaded it is a provocation to all the subjects of England.

"In *Reg.* v. *Adey* (1 Leach, 206), which was tried in 1779, a somewhat similar point arose, and the presiding judge, on the authority of *Tooley's Case*, reserved the point for the consideration of the twelve judges. The prisoner escaped in the riots of 1780, and no judgment was given, but Leach says that it was understood the judges held it to be manslaughter only.

"Again, in *Reg.* v. *Osmer* (5 East, 304), argued in 1804, Lord Ellenborough, C.J., says, that 'if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.'

"In *Reg.* v. *Phelps* (Car. & M. 180), tried in 1841, a policeman attempted to apprehend a man on suspicion of having stolen growing potatoes. He resisted, and some persons came to his

aid and killed one Southwood, whom the policeman had called to his assistance. Upon proof of these facts, Coltman, J., directed the jury that as the policeman had no right to apprehend the man the offence of those who killed Southwood was manslaughter only, and not murder.

"These appear to be the cases bearing most closely on the subject, but turning to the authority of text writers, and the *dicta* of judges, we find Hawkins, in his Pleas of the Crown (Book I. chap. xxxi. sec. 60), stating the law as it was laid down in *Hugget's* and *Tooley's Cases*, and adding that 'since in the event it appears that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.'

"Hale (P.C. vol. i. p. 465) also cites *Hugget's Case*, and apparently with approval.

"On the other hand, Foster, J., in his Discourse upon Crown Law (p. 312), while he appears to approve of the law as laid down in *Hugget's Case*, combats the doctrine of the majority of the judges in *Tooley's Case*, and appears to doubt the propriety of that decision, partly upon general principles, and partly because the second assault on the constable seemed to him rather to have been grounded upon resentment or a principle of revenge for what had before passed, than upon any hope or endeavour to assist the woman.

"It is these observations of Foster, J., which Alderson, B., appears to have had in his mind when he is reported to have said in *Reg.* v. *Warner* (1 Moo. C. C. 385), that *Tooley's Case* had been overruled. *Tooley's Case* had, in fact, no bearing upon *Warner's Case*, in which no attempt was made to arrest the prisoners at all, and Alderson, B., does not refer to any authority for his statement. A similar remark was made by Pollock, C.B., in *Reg.* v. *Davis* (Leigh & Cave, C. C. 71), but there again no authority is given.

"East, in his Pleas of the Crown, vol. i. p. 325, states the question with the arguments on either side, without shewing much leaning either way; and so does Russell (Criminal Law, vol. i. p. 632), although his editor, Mr. Greaves, from his note (p. 848 of the 4th edition), appears to have been convinced by the arguments adduced by Foster.

"It would thus seem that the doctrine laid down by the majority of the judges in the cases of *Ferrers*, *Hugget*, and *Tooley*, has been acted upon, not only in those cases, but also in *R.* v. *Adey* and *Reg.* v. *Phelps*, and recognised in *R.* v. *Mawgridge*, and *R.* v. *Osmer*, and by Hawkins and Hale.

"The opposite doctrine is supported by a minority of the Judges in *Hugget* and *Tooley's Cases*, and by Foster, J., and receives some sort of sanction from the observations of Alderson, B., and Pollock, C.B., if they can be considered to display a sufficiently accurate knowledge of the subject to entitle them to any weight. This view of the law, however, has never once been acted upon and it follows that if the prisoners convicted at Manchester be executed without any discussion of the law, they will be put to death in opposition to the decided cases on the subject, upon the authority solely of extra-judicial arguments and *dicta*.

"In some of these arguments a distinction has been taken between the interference of a friend or a relative, and that of a mere stranger; but this distinction does not appear to rest on any authority. Hawkins in his Pleas of the Crown (Book I. ch. xxxi. ss. 56 and 57), says, that 'if a man's servant, or friend, or even a stranger, coming suddenly and, seeing him fighting with another, side with him and kill the other—or, seeing his sword broken, send him another wherewith he kills the other—he is guilty of manslaughter only.' Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c., in the due execution of his duty, such friend, or servant, &c., are guilty of murder, whether they knew that the person slain were an officer or not.

"For these and other reasons, we are of opinion that the points raised in this case are of such a grave and serious character as to demand further discussion and consideration, and that they ought only to be decided after full and deliberate argument before the Court of Criminal Appeal.

"W. DIGBY SEYMOUR, Q.C.
"MICHAEL O'BRIEN, S.L.
"ERNEST JONES.
"JAMES COTTINGHAM.
"LEWIS W. CAVE."

REPLY OF MR. JUSTICE BLACKBURN.

"*November* 20, 1867.

"DEAR MR. SEYMOUR,

"Mr. Justice Mellor and I have received and carefully perused the paper signed by you, my brother O'Brien, and Mr. Cave.

"It contains nothing that is new to us, but it puts all the authorities in the light most favourable for your clients, and I need not say that it is a great satisfaction to us to think that nothing has been overlooked which could bear on so grave a question.

"The Legislature have by the 11th and 12th of Victoria, cap. 78, cast upon the presiding Judges the very disagreeable and invidious duty of determining whether their own view of the law at the trial is or is not so questionable as to justify an appeal. If they refuse to reserve any point made, it is still open to the prisoners to appeal to the equitable consideration of the Sovereign, but no appeal lies to any Court of law.

"In the present case my brother Mellor and I considered the points raised before us on the trial, and entertained no doubt that the direction which we then gave was strictly according to law. We, therefore, reserved no question for the Court of Appeal at the time, but simply postponed our final determination on the subject until we had the means of referring to the authorities and considering the case more at leisure. We have now considered the authorities, and have consulted the other Judges, not with a view of dividing our responsibility, nor in order to obtain a judicial opinion from them which they could not give on a point not regularly before them, but because, in a case so serious, we were very anxious to have the best advice and assistance that we could obtain for our guidance. I do not say, that if the result of such consultation and research had been to lead to the conclusion that there was doubt enough to justify a further appeal, it would have relieved us from a most painful responsibility. I regret to say that the result has been to satisfy us that the law is too clear to justify us in reserving any point for the consideration of the Court of Criminal Appeal.

"Entertaining that opinion, we have officially informed the Secretary of State for the Home Department, that there will be

no further appeal to a Court of law, and that it is now for Her Majesty's Government alone to determine what shall be done with the convicts.

"This decision of ours is final; but, as a satisfaction to you and the other Counsel for the prisoners, I will briefly state the reasons which have induced us to think the law too clear for argument.

"When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently if he is killed in the execution of his duty, it is in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But where the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.

"The cases which you have cited are authorities that where the affray is sudden, and not premeditated, when, as Lord Holt says in *R.* v. *Tooley* (2 Lord Raymond, 1300), 'it is acting without any precedent malice or apparent design of doing hurt,' the mere fact that the arrest was not warranted may be a sufficient provocation.

"But in every one of these cases the affray was sudden and unpremeditated.

"In the present case the form of warrants adopted may be open to objection, and probably might, on application to the Court for a writ of *habeas*, have entitled the prisoners to be discharged from custody; but we entirely agree with the opinion of Lord Hale (2 Pleas of the Crown) that, though defective in form, the gaoler or officer is bound to obey a warrant in this general form, and consequently is protected by it. This is a point which, had the affray been sudden and unpremeditated, we probably should have thought it right to reserve.

"In the present case, however, it was clearly proved that there was on the part of the convicts a deliberate, prearranged conspiracy to attack the police with firearms, and shoot them, if

necessary, for the purpose of rescuing the two prisoners in their custody, and that they were all well aware that the police were acting in obedience to the commands of a justice of the peace, who had full power to remand the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter.

"To cast any doubt upon this subject would, we think, be productive of the most serious mischief, by discouraging the police in the performance of their duties, and by encouraging the lawless in a disregard of the authority of the law.

"We feel bound, under these circumstances, to decline to take a course which might lead to the belief that we considered the matter as open to doubt.

"COLIN BLACKBURN."

NOTE X.

(TO CHAPTER XXXII.)

LIBEL.

The statement of the law of libel contained in this chapter is, I believe, complete, though it is very short in comparison to the standard works on the subject.

Folkard's edition of Starkie on Slander and Libel consists of 775 large 8vo pages, besides an appendix of statutes. It contains much other matter besides a definition of the crime of libel; but that definition and the explanation of the offence itself, fill more than 150 pages.

The greater part of this mass of matter consists of illustrations, but something is also due to the singularly complicated manner in which the law has grown up.

The word "malicious" in reference to the offence of libel has been elaborated by the judges into a whole body of doctrine on

the subject in the same sort of way as the words "malice aforethought" in the definition of murder.

The process was of this sort. Malice was first divided into malice in fact and malice in law—malice in fact being personal spite, and malice in law being defined to be "a wrongful act done intentionally, and without just cause or excuse."

Inasmuch as the publication of a libel must always be intentional, and inasmuch as the Courts held that to publish defamatory matter of another was, generally speaking, a wrongful act, the result of this was that every publication of defamatory matter was a crime, unless there was some just cause or excuse for it. What amounts to a "just cause or excuse" was decided by a multitude of cases. The phraseology employed in their decision has been as follows. Defamatory matter which it was considered lawful to publish has been described as a "privileged communication." This "privilege" has been regarded as rebutting the presumption of malice arising from the fact of publication; and it has further been divided into absolute privilege and qualified privilege—absolute if it justifies the publication, whatever may be the state of mind of the publisher; qualified if it justifies such publication only under particular circumstances, as, for instance, when the publisher in good faith believes the defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public good, &c.

The law thus falls into the singular condition of a see-saw between two legal fictions, Implied Malice on the one hand, and privilege absolute or qualified on the other.

I will give a single instance of the intricacy to which this leads. A. writes of B. to C., "B. is a thief." Here the law implies malice from the words used. It appears that B. was a servant, who had been employed by A., and was trying to get into C.'s employment, and that A.'s letter was in answer to an inquiry from C. Here the occasion of publication raises a qualified privilege in A., viz., the privilege of saying to C. that B. is a thief qualified by the condition that A. really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. B., however, proves not only that he was not a thief, but that A. must have known it when he said that he was. This raises a presumption of express malice, or malice in fact in A., and proof of the existence of express malice overturns the

presumption against implied malice raised by the proof of the qualified privilege.

This machinery of express and implied malice and qualified and absolute privilege is only a roundabout and intricate way of saying that as a general rule it is a crime to publish defamatory matter; that there are, however, certain exceptions to that rule by virtue of which it is not a crime to defame a man—

(*a*) If the defamatory matter is true, and its publication is for the public good.

(*b*) Although the defamatory matter is false,

(i.) if the libeller in good faith believes it to be true, and publishes it for certain specified reasons.

(ii.) Although he knows it to be false, if he publishes it in a particular character.

By working out this scheme, and stating in general terms that the publication of a libel is always malicious unless it falls within one or more of the specified exceptions, the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient and proximately complete, the scaffold may be taken down.

NOTE XI.

(TO ARTICLE 281, ON POSSESSION IN RELATION TO THE LAW OF LARCENY).

I do not think it would be possible to assign to the expressions "possession," "actual possession," "constructive possession," "legal possession," senses which would explain and reconcile all the passages in which these phrases occur in works of authority. Some of them indeed are absolutely contradictory. Thus is it said that the taking in larceny must be a taking out of the possession of the owner. It is also said that the owner retains the legal possession notwithstanding the larceny. If both of these propositions were true, it would follow that larceny could never be committed at all. Again, we are told on the other hand that the taking in larceny must be a taking out of the possession of the owner, the inference from which would naturally be

that when a thing is out of the owner's possession it cannot be stolen. We are then told, in order to avoid this conclusion, that a thing is always in its owner's possession; so that a box of plate at the bottom of the Thames, things of the existence of which the owner is not aware, as money vested in him as executor, and which without his knowledge is in the actual custody of another person,[1] or a dead rabbit in his wood, are all in the owner's possession and capable of being taken out of it. This way of stating the matter makes the assertion that the taking in larceny must be a taking out of the owner's possession insignificant. If, from the nature of the case, every taking must be a taking out of the possession of the owner, it is impossible to see how the takings which do, differ from those which do not, constitute larceny. All men, being mortal, it is useless to define an Englishman as a mortal man living in England. However, though it is impossible either to justify the manner in which the word "possession" is used, or to free it entirely from the fictions with which it has been connected, it is, I think, not impossible to define it in such a manner as to express all the distinctions which it is intended to mark in language differing very slightly, if at all, from that which has generally been used upon the subject.

As I have shewn in the articles on theft, and in the notes upon them, there are five different ways in which theft can be committed, viz:—

1. By taking and carrying away goods which do not belong to the thief from any place where they happen to be.

2. By converting property entrusted by the owner to a servant.

3. By obtaining the possession of property (as distinguished from the right of property) from the owner by fraud with intent to convert it.

4. By converting property given by the owner to the thief under a mistake.

5. By converting property bailed to the thief.

It will be found upon consideration that the distinctions

[1] A. put 900 guineas in a secret drawer in a bureau and died. B., her son and executor, lent the bureau to his brother C., who took it to India, kept it there for several years, and brought it back. B. then sold it to D., who gave it to E. to repair, who found the money. This was held to be such a taking by E. out of the possession of A. as to constitute larceny. *Cartwright* v. *Green*, 8 Ves. 405.

between these cases all arise out of the doctrine of possession, but it is, I think, less generally perceived that the important point is not the taking out of the possession of the owner, but the taking into the possession of the thief. The five cases in question may be thus arranged:—

In No. 1 (common larceny) the thief has neither the possession nor the custody of the stolen property at the time when the theft is committed, and it is immaterial whether the owner has it or not.

In No. 2 (larceny by a servant) the thief at the time of his offence may have either the custody or the possession. If he has the custody his offence is theft. If he has the possession hi offence is embezzlement.

In No. 3 (larceny by trick) the thief obtains the possession by a mistake, caused by his own fraud.

In No. 4 (larceny by taking advantage of a mistake) the thief receives the possession by a mistake not caused by his own fraud.

In No. 5 (larceny by a bailee) the thief receives the possession under a contract of bailment.

Besides this view of the subject the doctrine of possession is important in relation to procedure, and in that case the matter to be considered is not the possession of the thief but the possession of the owner. It is necessary in indictments for theft that the ownership of the stolen property should be correctly stated, and as possession constitutes special ownership (at all events, as against a thief) it is important, with a view to this subject, to understand what possession implies.

Passing from the law upon this subject, let us examine the facts to which the law applies—the different relations which, as a fact, exist between men and things—in reference to the common use of language.

The most obvious case of possession is that of a person who holds something in his hand. But it must appear upon the slightest consideration that neither this nor any other physical act whatever can be accepted as more than an outward symbol of the state of things which the word denotes. Unless the article possessed is very small, part of it only can be held in the hand, trodden on by the foot, or so dealt with by any other part of the possessor's body as to exclude a similar dealing with it by others. It would however, I think, be felt by every one that neither actual bodily contact with an object, nor even exclusive bodily contact

with it, was essential to what, in the common use of language, is meant by possession. No one would think of using different words to express the relation of a man to a coin clenched in his fist, to a pocketbook in his pocket, to a portmanteau of which he carried one end and a railway porter the other, to a carriage in which he was seated whilst his servant was driving it, to a book on the shelves of his library, and to the plate in his pantry under the charge of his butler. He would, in the common use of language, be said to be in possession of all these things, and no one would feel any difficulty in perceiving the correctness of the expression even if it were added that he was not the owner of any one of them, that some had been lent, and others let to hire to him. On the other hand, any one but a lawyer would be surprised at the assertion that a man, whether the owner or not, was in possession of a watch which he had dropped into the Thames, of sheep which had been stolen from his field and driven to a distance by the thief, of a dead grouse which, having been wounded at a distance from his moor, had managed to reach it and die there without his knowledge or that of any other person.

The common feature of all the cases to which the word "possession" would obviously be applicable is easily recognised. It is to be found in the fact, that the person called the possessor has in each instance the power to act as if he were the owner of the thing possessed, whether he actually is the owner or not. Several of the illustrations given, however, shew that though this is one of the things which the word conveys, it is not the only thing conveyed by it. The butler in charge of the plate, the porter helping to carry the portmanteau, the coachman who is driving the coach, have the physical power of acting as the owner of those things as much as their master or employer. Indeed, in two of the three cases their physical control over the object is more direct than his. The difference is that the circumstances are such as to raise a presumption that their intention is to act under the orders of their superior, and that he (at least for the present) has no definite superior whose orders he intends to obey. Take, for instance, the case of a dinner party: there is no visible difference between the master of the house and his guests; each uses the article which he requires for the moment, and they are, from time to time, removed from place to place by the servants; as, however, the master retains throughout not merely the legal right to dispose of them absolutely, but the immediate means of enforcing that right

if from any strange circumstance it should become necessary to do so, the assertion that the plate is in his possession, and that his guests and servants have merely a permission to use it under his control, has a plain meaning: nor would that meaning be altered or obscured if the fact were added that the plate did not belong to the master of the house, but was hired by him for the occasion. Indeed, if he had stolen the plate, or received it knowing it to be stolen, the fact denoted by the word "possession" would remain. These illustrations, which might be multiplied to any extent, appear to me to shew clearly that possession means, in the common use of language, a power to act as the owner of a thing, coupled with a presumable intention to do so in case of need; and that the custody of a servant, or person, in a similar position, does not exclude the possession by another, but differs from it in the presumable intention of the custodian to act under the orders of the possessor with reference to the thing possessed, and to give it up to him if he requires it. Thus far, I think, my definitions correspond with the common use of language, though of course popular language upon such a subject is not, nor is there any reason why it should be, minutely exact.[1]

I will now compare it with the way in which the word is used by legal authorities. I know of no set dissertations on the subject of the use of the word "possession" in English law like those which are to be found in abundance upon the corresponding word in Roman law. It would be an endless and a useless labour to go through the cases in which the word has been used, endless on account of their great number, useless because it is the characteristic of English judges to care little for technical niceties of language in comparison with substantial clearness of statement in reference to the actual matter in hand. Upon such a matter as this accordingly, it is better to consider the different authorities in groups than individually.

Possession (in reference to the subject of theft) is usually divided into two branches—actual possession and constructive possession.

It seems to have been pretty generally assumed that the words "actual possession" were sufficiently plain for practical purposes

[1] This view was suggested by a study of Savigny's Recht des Besitzes, which, however, deals with many topics to which nothing in English law corresponds. Mr. George Long's article on "Possessio" in the Dictionary of Greek and Roman Antiquities contains the substance of Savigny in a very convenient form. Mr. Hunter's Roman Law, pp. 195–222, may also be consulted.

without further explanation; but it would be easy to shew, by a multitude of cases, that actual possession differs from possession as I have defined it only in one point. It is usual to say that a thing in the possession of a servant on account of his master is only constructively in the possession of the master. But the expression "constructive possession" has another meaning besides this. As it was considered necessary that a thing stolen should be taken out of the possession of the owner, and as in very many instances goods are stolen which are not in any natural sense in the possession of any one whatever, it has become a maxim that goods are always in the possession of the owner; if not in his actual, then in his constructive possession, or, as it is sometimes called, in his legal possession.

Thus, constructive possession means:—

1. The possession of goods in the custody of a servant on account of his master, and

2. The purely fictitious possession which the owner of goods is supposed to have, although they are in reality possessed by no one at all.

The phrase thus appears to me to be objectionable, not only because it is ambiguous, but because, in the first of its two senses, it conceals a truth, whilst in the second it needlessly conveys a false impression. The truth concealed is that a man may have, and may intend to use, the power implied in the word "possession," although he acts through a servant. The false impression conveyed is that things cannot be out of possession, or that if they are, they cannot be stolen.

I avoid this by abstaining altogether from the use of the expression "constructive possession." In "possession" I include that which has to be exercised through a servant, and my language implies, that a person may commit theft on objects which are not in the possession of any one at the time of the theft. The existing law may by these means be expressed in well-recognised and established phraseology, without any resort to legal fictions.

The point upon which the most subtle questions as to possession arise, is the distinction between theft and embezzlement—a perfectly useless distinction, no doubt, and one which the legislature has on two separate occasions vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.

I have already explained how a man may retain the possession of a thing of which he gives his servant the custody. He retains a power over the thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master's having given his horse to his groom or his plate to his butler, a horsedealer has delivered the horse to the groom, or a silversmith has delivered plate to the butler for his master: I should have thought that there was no real difference between these cases; that inasmuch as the servant in each case was acting for the master in the discharge of a duty towards him, and under an agreement to execute his orders, the master would come into possession of the horse or the plate as soon as his servant received it from the dealer or the silversmith, just as he remains in possession of the horse or the plate when he gives the custody of it to his groom or his butler. I should also have thought that the servant who appropriated his master's property to his own use, after receiving it from another on his master's account, was for all purposes in precisely the same position as the servant who did the same thing after receiving it from his master. The Courts, however, decided otherwise. They have held on many occasions that, though the master's possession continues when he gives the custody of a thing to his servant, it does not begin when the servant receives anything on account of his master; on the contrary, the servant has the possession, as distinguished from the custody, until he does some act which vests the possession in his master, though it may leave the custody in himself. If during that interval he appropriates the thing, he commits embezzlement. If afterwards, theft. The most pointed illustration of this singular doctrine which can be given occurs in the case of *R.* v. *Reid* (Dear. 257). B. sent A., his servant, with a cart to fetch coals. A. put the coals into the cart, and on the way home sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because though A. had the custody of the cart all along, yet the possession of it and its contents was in B., and though A. had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the

cart, so that A.'s offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart.

These explanations will, I hope, render the article in the Digest intelligible. In order to justify it legally, it is necessary to state the manner in which I arrived at it. I examined a large number of cases, of which I have put eleven in the form of illustrations to the article. In some of these cases it was decided that the offence was theft; in others that the offence was embezzlement. I have assumed (as I was entitled to do, as appears from the explanations given above) that whenever an offence was held to be theft the property stolen was in the possession of the owner or master, although it might be in the custody of a guest or servant; and that whenever the offence was held to be embezzlement the property embezzled was in the possession, as distinguished from the custody, of the servant. I might easily have enlarged the number of illustrations to any conceivable extent; but if those given are not enough to make the matter plain, I despair of making it plain or understanding it, and I do not wish to make it darker than it is. It is, perhaps, just worth while to add once more, that I am in this work merely stating, and not attempting to justify, the law. The technicalities on this subject appear to me to be altogether superfluous, and I think they might be easily dispensed with by re-defining the offence of theft, or even by removing the distinction between theft, embezzlement, and false pretences.

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