# PURITY AND REALISM IN THE CRIMINAL LAW.

The most notable events in English criminal law in recent years have not been the decisions in leading cases, but the publication of new editions of the leading text-books and works of reference. This is not to say that there have been no cases of great importance, but it is submitted that the appearance of new editions of *Russell on Crime*,[1] and Kenny's *Outlines of Criminal Law*,[2] and Cross and Jones' *Introduction to Criminal Law*[3] far transcend in importance any judgment delivered in a criminal case in recent times.[4] Add to these publications the impending appearance of a treatise on the principles of criminal law from the pen of Professor Glanville Williams, and it becomes clear that the major events in the criminal law these days are publishing events.

Coupled with this flow of books from the press, one must mention the revival of interest in academic circles in the problems of criminal law, which is witnessed not only by these publications themselves, but also by the appearance of numerous learned articles and notes on criminal law in the quarterly journals. It is perhaps appropriate that some endeavour should be made at this stage to estimate the significance of these developments and assess the trends. It is submitted that two developments of great interest are taking or have taken place in relation to English criminal law: (1) The intrusion of academic writers into the field of the professional literature; (2) The emergence of two distinct schools of thought in relation to criminal law. The purpose of this article will be to discuss these developments.

(1) *The intrusion of academic writers into the field of the professional literature.*

This is witnessed by the fact that the new edition of *Russell on Crime* has been prepared by Mr. J. W. C. Turner, whose work as a teacher of criminal law at Cambridge is known to generations of

1 *Russell on Crime*, 10th edn. by J. W. C. Turner, 2 vols., 1950.

2 Kenny's *Outlines of Criminal Law*, 16th edn. by J. W. C. Turner, 1952.

3 Rupert Cross and P. Asterley Jones, *An Introduction to Criminal Law*, 3rd edn., 1953.

4 In this connection, it is interesting to note that no criminal cases have reached the House of Lords for some time.

Cambridge students, and whose learned articles about mens rea, attempts, homicide, and larceny constitute essential reading to all those seriously concerned with the study of the criminal law. This is the first time for *Russell on Crime* to fall into academic hands since it was originally published in 1819.

Of course, it is nothing new for a practitioners' book to be edited by a university man. What is interesting is that there is an increasing tendency in this direction, and that the criminal law has now felt this influence. Whether this can be attributed to a growing appreciation of the value of the contribution which the universities are making to the study of the law, and the demand for a higher standard of editorship by the profession and the publishers, or whether it is really due to the inability to find competent practitioners with sufficient leisure to undertake such tremendous tasks, it is difficult to say. The fact remains that in recent years several standard works of reference in different fields of law have been edited by university men.[5] That there still remain many works which might be improved if they were entrusted to such persons only serves to provide room for comparison between the achievements of the different kinds of editors, which, it is suggested, shows the university editor in a not unfavourable light.[6]

The generous reception which was accorded to the new edition of Dicey's *Conflict of Laws* shows that university editorship is capable of being a resounding success. Yet there can be no doubt that it has its dangers, and these, it is submitted, can be seen from the new *Russell on Crime*. Mr. Turner has incorporated into the text lengthy passages in which he expounds the history of particular topics in which he is interested, recapitulating the views which he has previously expressed elsewhere,[7] while large tracts of the treatise remain substantially unchanged and unimproved. The result is rather uneven, to say the least. Perhaps it is asking too much for one man to revise thoroughly a treatise running into nearly 2000 pages, con-

[5] Mention may be made of *Arnould on Marine Insurance*, 13th edn. by Lord Chorley of Kendal, 2 vols., 1950; and Dicey's *Conflict of Laws*, 5th edn. by J. H. C. Morris and others, 1949.

[6] Treatises in criminal law where there is much room for improvement include Archbold's *Criminal Pleading, Evidence and Practice* (see 32nd edn., 1949. reviewed in (1951) 14 Mod. Law Rev. 233); and Roscoe's *Criminal Evidence* (see 16th edn., 1952, reviewed in (1952) 2 J. Soc. Pub. Teach. Law 60).

[7] See *The Modern Approach to Criminal Law* (1941), edited by L. Radzinowicz and J. W. C. Turner, which includes several of Mr. Turner's articles previously published in the Cambridge Law Journal.

taining a vast accretion of old case law. Such tasks are better entrusted to a team, as was done with Dicey.[8]

The intrusion of academic writers into the field of students' text-books and general treatises is not surprising, but here again, as with works of reference, there have been considerable developments in recent years, so that it is hardly possible for the student to prepare even for the professional examinations without recourse to treatises which have issued from the pens of academic writers. Such students' books as remain in the hands of practitioners do not usually come in the same class from the point of view of quality.

(2) *The emergence of two distinct schools of thought in relation to English criminal law.*

Conflicting views have always been held as to the objects and purposes of the criminal law and the treatment of offenders, and never more so than at the present day. The controversy over the treatment of offenders intrudes into the substantive law and cannot be disregarded by the student of criminal law. For example, the question how far infants ought to be held responsible for criminal misconduct, and the question whether irresistible impulse caused by mental disease should be a good defence to crime, cannot be ignored.

However, it is not this kind of controversy which it is proposed to consider here, but something of greater concern to the criminal lawyer *qua* lawyer, namely, the emergence in recent years of two distinct schools of thought in relation to the criminal law itself, i.e., in relation to the detailed rules of substantive law which it is the purpose of students to learn, and of practitioners and judges to apply. These two schools may be called, for lack of any better description, the purist and the realist school. They consist, on the one hand, of Mr. J. W. C. Turner and his disciples, and on the other, of Mr. Rupert Cross and his followers.

*The purist school.*

The new editions of Russell and Kenny, which have been prepared by Mr. J. W. C. Turner, have given him an opportunity to advance once more the views which he has previously developed in relation to certain topics in the criminal law, and which were expressed in articles published in the Cambridge Law Journal, and later re-printed, with some additions and alterations, in the *Modern Approach to Criminal Law*. These views may be summarised briefly

[8] See the review of *Russell on Crime* in (1952) 15 Mod. Law Rev. 260.

by saying that Mr. Turner pursues most diligently a quest for principle in the criminal law, and when he has found that for which he seeks, he declares war upon any decision or line of decisions which conflicts with this principle, in the interests of a pure theory of criminal law.

His approach may be gathered from the following extract from *Russell on Crime,* in relation to the law of homicide:

> "It is incumbent upon writers, especially in matters of general principle, whenever there appears to be a lack of precision in the authorities, to make concrete suggestions for the removal of doubts and difficulties. At the present day the law of homicide seems to elude formulation if nothing more can be done than to collate the words of authority as set out in the reports of decided cases. In such a predicament it is useless to arrange the cases and instances in this or that order. The only solution is to decide upon one or more satisfactory general principles and to face the fact that this entails the abandonment of such declarations and dicta as conflict with them."[9]

Now there is no room to quarrel with this declaration of policy nor with the similar passage in the preface to the new *Kenny's Outlines* in which Mr. Turner announces that he has made no attempt "to obscure anomalies of legal principle or conflicts of legal interpretation" because of his belief that it is necessary to encourage the critical powers of students, and that "to recognize that an authoritative decision must be followed is a very different thing from accepting it as necessarily sound or satisfactory."[10] The difficulty arises in seeing how some of Mr. Turner's solutions can be accepted, involving the adoption, as he puts it, of "one or more satisfactory general principles" and "the abandonment of such declarations and dicta as conflict with them", without at the same time infringing the principle that "an authoritative decision must be followed." This difficulty will be demonstrated first in relation to larceny by mistake.

Mr. Turner contends that the cases of *Middleton,*[11] *Ashwell,*[12] *Riley,*[13] and *Hudson*[14] were wrongly decided, and that there is no principle of law which entitles a Court to convict a person of larceny where at the time of the delivery of the subject-matter of the crime

[9] *Op. cit.,* 38.
[10] *Op. cit.,* Preface, vi.
[11] (1873) L.R. 2 C.C.R. 38.
[12] (1885) 16 Q.B.D. 190.
[13] (1853) Dears. C.C. 149, 169 E.R. 674.
[14] [1943] K.B. 458.

there was a transfer of ownership, albeit under a mistake as to the validity of or reason for the transfer, as in *Middleton*, or under a mistake as to the value of the thing transferred, as in *Ashwell*.

It will be recalled that *Middleton* was the case where a post-office clerk referred to the wrong letter of advice and paid out to the accused more than he was entitled to from his savings account. Middleton realised the mistake but took the money, and was subsequently convicted for larceny. *Ashwell* was the case where a sovereign was mistaken for a shilling, and when the accused discovered the mistake, he decided to keep the coin and say nothing about it.

Although the rule in *Middleton* has been expressly incorporated in the Larceny Act, 1916, Mr. Turner denies its validity and seeks to argue round the statutory provision,[15] which is to the effect that the expression "takes" for the purpose of the law of larceny includes obtaining the possession "under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained." His contention is that the post-office clerk intended to transfer ownership in the money and did transfer it to Middleton, and that therefore Middleton could not be guilty of larceny. It must be admitted that this argument is very persuasive.

With regard to Ashwell, he contends that when the accused discovered for the first time that he had a coin different in value from that which he thought he had, it was already too late for him to steal it, for in larceny the intention to appropriate must be formed at the time of the taking possession, and Ashwell acquired possession of the coin, although he was under a mistaken impression as to its value, at the very moment when it was physically transferred to him. This view of the case has been strongly supported by Mr. Edwards,[16] who points with asperity to the spectacle of two of the judges who took part in *Ashwell* and were in favour of conviction, hastening to correct any impression that they did not subscribe to the old rule of law that receipt and appropriation must be contemporaneous in larceny.[17] This was in *Flowers*,[18] in the following year.

The line taken by Mr. Turner and his followers over *Middleton* and *Ashwell* leads them to disapprove of *Riley* and *Hudson*. The taking of the white-faced lamb and the subsequent sale of it by Riley

15 6 & 7 Geo. 5, c. 50, sec. 1 (2) (c).
16 J. Ll. J. Edwards, *Possession and Larceny*, (1950) 3 Current Legal Problems, 127 *et seq.*
17 *Ibid.*, 148-149.
18 (1886) 16 Q.B.D. 643.

along with the twenty-nine black-faced ones is said not to have been larceny, because at the time when Riley drove away the lambs, he had no intention of stealing the white-faced lamb, for he did not know it was there.

*Riley* has recently been followed by the Divisional Court in *Ruse v. Read*,[19] and the continuing trespass idea, which was originally given as one reason for convicting Riley, was approved. There was really no need for the Court to have based its decision on this ground, for there was another ground, which had been mentioned by Pollock C.B. in *Riley*, which would have been more suitable, viz., that a person does not take a thing until he knows that he has got it. This was the idea expressed by Lord Coleridge C.J. in *Ashwell*,[20] and adopted by Charles J. on behalf of the Court of Criminal Appeal in *Hudson*.[21] In view of the approval of the latter case in *Ruse v. Read*, it is odd that its ratio decidendi was not adopted.

Hudson had received a letter containing a cheque meant for a neighbouring farmer with a similar name. After keeping the letter for a few days unopened, he eventually opened it, and converted the cheque which he found inside. It was said that when he opened the letter, "at that moment he could for the first time allow his intelligence to operate" with regards to the contents. He thereupon formed the intent to steal the cheque. This decision has attracted the hostility of the purists, who argue that Hudson did not commit larceny at the time when he opened the envelope containing the cheque, for what he did then was to send the cheque back to the Ministry of Food, whence it came, with an ambiguously worded letter pointing out that the cheque was not properly made out.[22] The Ministry sent it back to him with his initials inserted, and he paid it in to a bank to the credit of his own account. It is said that Hudson might well have been convicted for larceny for what he did on this second occasion, but that it is difficult to see how he could be guilty of larceny on the first occasion he handled the cheque. The pure theory of larceny is offended by this decision.

*The realist school.*

It is now necessary to consider the views of the realist school in relation to this question of larceny by mistake. The adherents of

19 [1949] 1 K.B. 377.
20 (1885) 16 Q.B.D. 190, at 225.
21 [1943] K.B. 458.
22 See an article by M. R. E. Kerr, *The Time of Criminal Intent in Larceny*, (1950) 66 Law Q. Rev. 174; Turner, in the new *Kenny*, at 251; Edwards, *loc. cit.* at 143-144.

this school, led by Mr. Rupert Cross, deny that these leading cases in larceny offend against any principles, but contend that they represent a striking example of the refusal of the Courts to be led away from reality by theoretical considerations.

With regard to *Middleton,* it is said by Mr. Cross that there was a mistake as to the identity of the accused, which prevented the property from passing to Middleton, and, because Middleton was aware of the mistake, he could be convicted of stealing the entire sum of money which was handed to him.[23] Mr. Cross says that a mistake as to quantity would also be covered by the rule in *Middleton* and the Larceny Act provision, but that a mistake as to the value of the property would not be sufficient. This meets the objection made in connection with *Ashwell* that it necessitates holding that a person who buys a painting at a sale and subsequently discovers it to be an old master ought logically to be held guilty of larceny of the excess of the value of the picture over the price which was paid. Such a case clearly has nothing to do with the situation in *Ashwell,* but is governed by the ordinary principles governing the sale of goods where property has passed from the vendor. If the painting was believed to be of value, and turned out to be worthless, the principle *caveat emptor* is applicable. The situation mentioned might well be described as invoking the principle *caveat vendor.*

With regard to *Ashwell,* it is pointed out that Ashwell knew he had received the coin but for some time he was ignorant of its identity, and the question is when did he take it.[24] The answer lies, it is said, in the statement of Lord Coleridge C.J., already mentioned, that "in good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it."[25] It is observed that this is the view adopted in *Hudson,* and it is submitted by Mr. Cross that "if the facts of *Ashwell's* case were to come before the Courts today, *R. v. Hudson* would be an authority in favour of the guilt of the accused."[26]

*Hudson* is described by Mr. Cross as "the logical outcome of the history of the law of larceny", because it treats the receipt of the envelope separately from the receipt of the cheque, following the "breaking bulk" cases, and treats a mistake operative to prevent the property from passing, fraudulently induced, as negativing any

23 Cross and Jones, *op. cit.,* at 201, following Pollock and Wright, *Possession in the Common Law,* 111-112.

24 Cross and Jones, *op. cit.,* at 202-203.

25 *Loc. cit., supra.*

26 *Op. cit.,* at 203.

delivery, in accordance with the larceny by trick cases.[27] Mr. Cross is not perturbed by the argument that a person in the position of Hudson or Ashwell could be regarded as having sufficient possession of the cheque or coin to found a prosecution against a third party for larceny, even before he discovered what he had got and himself decided to appropriate it, and that contradictory views of possession are consequently being adopted. He counters this argument by saying that one must frankly acknowledge that possession is a word with different meanings in different connections,[28] and that the property problem, i.e., whether a landowner has legal control of a chattel lying on his property, is quite a distinct legal problem from the theft problem, i.e., whether one can be guilty of larceny when one receives something and only later discovers what one has got, and thereupon appropriates it. *Merry v. Green,*[29] which was followed in *Hudson,* is approved by the realists, and *Hudson* is regarded as perfectly correct and sensible.[30] Of course, it is admitted that the position revealed by these larceny cases is not very elegant or logical, and that some statutory revision of the law of larceny might well be undertaken.[31] But Mr. Cross writes *de lege lata* not *de lege ferenda,* and, pending any such revision, there seems to be more point in praising the common sense and realism of the judges who have solved the problems with which they have been faced in such a practical manner, than in bemoaning the lack of purity of principle in the case law.

It remains to consider the case of *Riley.* Mr. Cross admits that "a serious difficulty remains as a result of the first reason given for the decision . . . this involved holding that Riley acquired unlawful possession of the white-faced lamb before he became aware of its presence in his flock. If this conclusion is correct, it may well be asked how it comes about that Hudson did not take possession of the cheque until he knew that he had got it, and why Ashwell did not take possession of the sovereign until he discovered its identity."[32] He suggests that the answer which is most consistent with the authorities is that,

> "If a man gets control of a thing by means of a trespass, even if he does not know that he is committing one, he is treated

27 Rupert Cross, *Larceny De Lege Lata,* (1950) 66 Law Q. Rev. 497.
28 *Ibid.,* at 501.
29 (1841) 7 M. & W. 623, 151 E.R. 916.
30 Cross is supported in this view by P. B. Carter, in his article entitled *Taking and the Acquisition of Possession in Larceny,* (1951) 14 Mod. Law Rev. 27.
31 Cross, *loc. cit.,* 510.
32 *Op. cit.,* at 203.

> as having possession, because he immediately incurs the responsibilities of a possessor towards the owner of the thing in respect of its safe keeping and re-delivery. On the other hand, one to whom the control of an article is transferred by the owner is immune from these responsibilities until he assents to possession, and, in the absence of evidence on that point, he cannot be presumed to do this until he knows what he has got."[33]

*Riley,* however, as we have already stated, is capable of being explained as being based upon the same principle as *Hudson* and *Ashwell,* viz., that the accused did not take the thing in question until he knew he had got it. The Quarter Sessions chairman directed the jury in accordance with this view, and it was mentioned by Pollock C.B., but unfortunately the doctrine of continuing trespass has found favour with the judges, having been adopted by the Divisional Court in *Ruse v. Read* as the true ground of the decision in *Riley.* In *Matthews,*[34] Lord Goddard C.J. declined to extend this principle of continuing trespass to a case of receiving, and observed that even in regard to larceny it was controversial.

Considerable space has been allotted to the discussion of the larceny by mistake cases because it is in relation to them that the divergence of views between the purists and realists is most strikingly evident. But the same divergence may be traced in relation to the special property concept in larceny, in relation to the law of aiding and abetting and the defence of duress, in relation to the scope of fraudulent conversion, and in regard to attempts, and the doctrine of constructive murder.

*The special property concept.*

There is a difference of opinion over the question what interest a person must have in the subject-matter of the crime to entitle him to prosecute for larceny. The Larceny Act, 1916, defines larceny in terms of taking without the consent of the owner, and sec. 1 (2) (iii) says that "the expression 'owner' includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen." Recent cases have shown how wide this definition really is. In *Hibbert v. McKiernan*[35] it was held that a golf club had "special property" in golf balls which had been lost on their links, sufficient to found a prosecution in larceny, not-

33 *Ibid.,* 203-204.
34 (1950) 34 Cr. App. R. 55, [1950] 1 All E.R. 137.
35 [1948] 2 K.B. 142.

withstanding that the balls had been abandoned by their owners and that the club did not know exactly where they were. The club had previously warned the accused in this case, and had placed a policeman on watch to prevent unauthorised persons from trespassing on the links for the purpose of picking up lost golf balls. In these circumstances, it was held that the intention of the club to exercise control over the balls was proved, and that that was sufficient to found a prosecution for larceny.

*Hibbert v. McKiernan* followed *Rowe*,[36] where a company was held entitled to prosecute for larceny of iron lying in a canal bed, notwithstanding that the company had not been aware that the iron was there until the theft took place. Mr. Cross comments that these cases

> "are . . . of little weight in relation to the question whether knowledge of a thing's existence is essential to the acquisition of such possession as will secure immunity on a prosecution for larceny, in the event of the subsequent formation of the *animus furandi*. They were both concerned with the procedural question whether the property was well laid in cases where there was no doubt that the accused took possession with felonious intent. As Sir James Stephen observed, the important point in larceny is not the taking out of the possession of the owner, but the taking into the possession of the thief."[37]

Mr. Edwards has pointed that these decisions involve giving a different meaning to possession from that adopted in relation to larceny by mistake,[38] but Mr. Cross does not regard it as absurd that such different meanings of possession should be adopted according to whether the question arises in connection with determining the guilt of the accused or the title of the prosecutor. He refuses to regard such cases as contradicting *Ashwell, Riley* and *Hudson*.

There has been some criticism of *Harding*,[39] in which a maid-servant was held to have sufficient property in her employer's mackintosh to found a prosecution for robbery against two men who broke into her employer's dwelling-house and attacked her with a rolling pin, forcing her to hand over the mackintosh. The phrase used in this case to describe the maid-servant's interest in the mackintosh was "special property". It has been argued that this term

36 (1859) Bell C.C. 93, 169 E.R. 1180.
37 (1950) 66 Law Q. Rev. 497, at 502, referring to Stephen's *Digest*, 8th edn., 513.
38 *Loc. cit.*, at 145 and 149.
39 (1929) 21 Cr. App. R. 166.

is synonymous with possession, and that the decision in this case was clearly erroneous because the maid-servant did not have possession of the mackintosh, but only custody of it.[40] Mr. Cross doubts whether "special property" is synonymous with possession,[41] and points out that sec. 1 (2) (iii) of the Larceny Act, 1916, is wide enough to include both a servant, who has custody of his master's goods, and a bailee, who has special property in the goods bailed. It is perhaps unfortunate that the Court in *Harding* used the term "special property" when what was involved was a servant's custody.

That a person who has special property as a bailee can prosecute for larceny even where it is the owner of the goods who has stolen them is demonstrated by *Rose v. Matt*,[42] where a man who had deposited a travelling clock with a shop-keeper as security for the payment of the purchase price of some articles which he had bought was held guilty of larceny when he subsequently contrived to steal his own clock back again.

Mr. Edwards suggests that the shop-keeper obtained legal possession of the clock as a bailee for value, and that "to refer to the shop-keeper as having a 'special property in' the article stolen is unnecessary."[43] Mr. Cross, however, thinks that the phrase "special property" was used in this case not in the wide sense, as being synonymous with possession, but "was used in a more restricted sense to denote possession coupled with an interest in goods which the civil law will protect against their owner."[44] This, he explains, is different from the possession which a gratuitous bailee has, in that where the owner retakes the goods his conduct is prima facie fraudulent and evidence that the deprival was meant to be permanent. Mr. Cross does not object to the use of the term "special property" in this connection.

*Duress and Aiding and Abetting.*

Neither the purists nor the realists wish to see the Courts upsetting established principles or perpetuating outworn doctrines.[45]

40 Edwards, *loc. cit.*, 136-138.
41 *Op. cit.*, 173-174.
42 [1951] 1 K.B. 810.
43 Note on *Stealing One's Own Property*, (1951) 14 Mod. Law Rev. 215, at 217.
44 Rupert Cross, *Larceny by an owner and Animus Furandi*, (1952) 68 Law Q. Rev. 99, at 100.
45 For instance, they are agreed in their criticism of the dicta of Lord Goddard C.J. in *R. v. Jones*, (1948) 33 Cr. App. R. 11. See Turner, in the new *Kenny*, at 215, and the notes by Cross on *Larceny of Money by a Trick* in (1949) 65 Law Q. Rev. 446.

The difference between them lies in the extent to which they are willing to pursue the quest for a pure theory of criminal law or accept the ever-present tendency to compromise principles in the interests of expediency. This latter tendency has recently been shown by the decision in *Bourne*,[46] where the Court of Criminal Appeal held that a person could be guilty of aiding and abetting another person where that other would have had a good defence of duress had she been charged with the principal offence. Once again the same contestants enter the lists to contest the merits of a controversial decision, adopting diametrically opposed points of view. There is no need here to recapitulate the conflicting arguments. Suffice it to say that both Professor Glanville Williams[47] and Mr. Edwards[48] consider the decision to be unwarranted and contrary to the established principles of the criminal law, whereas Mr. Cross[49] believes that the conviction of *Bourne* for aiding and abetting "was consonant with the old learning on the subject,"[50] and that Lord Goddard's decision is "particularly welcome"[51] on account of his "refusal to allow terminology to be the determining factor," and to let such terms as are used in this connection "obscure the real question at issue in cases involving joint criminal action."[52]

*The scope of fraudulent conversion.*

The conflict of views may be further illustrated in regard to the scope of fraudulent conversion under sec. 20 (1) (iv) of the Larceny Act, 1916. Mr. Turner considers that this offence is applicable only to cases where one person has entrusted the ownership of his property to another.[53] He argues that cases where possession has been entrusted fall to be dealt with under the proviso to sec. 1 of the Larceny Act, dealing with larceny by bailees, and that it is reasonable to suppose that the legislature would not make the same conduct punishable as a felony under one section and as a misdemeanour under another section of the same statute. Persuasive as this sounds in theory, it is challenged by Mr. Cross, who contends that fraudulent conversion "overlaps with many instances of larceny by a bailee, and even of embezzlement and larceny by a servant", and that it is not un-

46 (1952) 36 Cr. App. R. 125.
47 See his note on the case in (1953) 16 Mod. Law Rev. 384.
48 See his article entitled *Duress and Aiding and Abetting,* (1953) 69 Law Q. Rev. 226.
49 See his reply to Edwards in (1953) 69 Law Q. Rev. 354.
50 *Ibid.*, 357.
51 *Ibid.*, 358.
52 *Ibid.*, 357.
53 *Kenny*, 270-271.

precedented for the same set of facts to be regarded as constituting two different offences, even where one is a felony and the other a misdemeanour, and both offences are provided for in the same statute.[54]

*Attempts.*

Another topic over which there is a division of opinion between the purists and the realists is the law relating to attempted crimes, where the attempt is frustrated because of impossibility. Mr. Turner contends that it makes no difference whether the reason for the impossibility lies in the means adopted by the accused to achieve his goal, or in the end to which his efforts are directed, and that both the person who tries to poison another with a harmless powder and the person who shoots at an empty bed believing his intended victim is sleeping in it ought to be held guilty of attempted murder.[55]

There is little authority on this matter, but in *Osborn*[56] where a man had sent a harmless powder to a woman with the intention of enabling her to procure an abortion, it was held that he was not guilty of attempting to administer noxious things to the woman with intent to procure an abortion, the learned judge having told the jury that the accused could only be guilty if the powder was noxious and he knew it was noxious, and that a person in the position of Osborn ought not to be convicted because he was not on the job at all, even though he thought he was.

This case conflicts with the theory advanced by the purists, but accords with the considerations of public interest and social policy which have from the beginning inspired the law of attempts.[57] Even by Mr. Turner's own standards, Osborn had not committed an attempt, for there was no act which was a step towards the commission of the crime in view;[58] and, as Mr. Turner himself admits, "many a man has been saved from crime by error."[59]

*The Constructive Murder Rule.*

Finally, it is possible to trace the desire for a pure theory of criminal law in the criticism which has been voiced of the constructive

54 Cross and Jones, 211-221.

55 See his essay on *Attempts to Commit Crimes*, in *Modern Approach to Criminal Law*, 273 *et seq.*, especially from 284 on, and the new *Kenny* at 83.

56 (1919) 84 J.P. 63.

57 See the article by F. B. Sayre on *Criminal Attempts*, (1927-28) 41 Harv. Law Rev. 821.

58 Mr. Cross appears to suggest this, *op. cit.* at 83, but he does not discuss *Osborn*.

59 *Modern Approach to Criminal Law*, 284.

murder rule. No doubt there is a strong case for sweeping away this survival from the period of strict liability in criminal law, and for basing liability in homicide, whether for murder or manslaughter, solely on the question of foresight of consequences.[60] But this is a theoretical case which ignores the practical considerations which alone account for the survival of the doctrine of constructive murder. The judges have clung on to this remnant of strict liability only because in their view it served a useful purpose in discouraging the use of violence by criminals. It is this desire to protect the community which has prompted the Courts to hold that "he who uses violent measures in the commission of a felony involving personal violence does so at his own risk."[61] Mr. Cross comments that the difference between the view taken by the judges as to what the law is and Mr. Turner's interpretation of what the law ought to be, although it is of great theoretical interest, "is not of much practical importance, because there cannot be many cases in which a jury would find that a man who knew of the surrounding circumstances rendering it highly probable that the consequence of his voluntary conduct would be fatal did not in fact foresee them."[62]

To demand the abolition of the constructive murder doctrine in the name of theoretical purity, or even in the interest of limiting the number of persons found guilty of murder and sentenced to death,[63] and to ignore the social policy behind the rule, is like asking for the exemption of all persons who commit crimes while under the influence of drink from criminal sanctions if, because of their condition, they could not have foreseen the consequences of their conduct. Social policy does not permit drunkenness to be an effective defence to crime. Neither does social policy allow the violent criminal to shelter under the no-foresight umbrella. The policy of the law in each case, though theoretically questionable, is perfectly understandable—if not in fact justifiable.

The modern approach to criminal law must surely be to uncover these social policies which have inspired the detailed rules of law in the past, and still determine them at the present day, rather than to campaign for a theoretical purity which the criminal law, above all other branches of the law, is unlikely ever to attain. If this approach

60 See Turner's arguments in his essay on *The Mental Element in Crimes at Common Law*, in *Modern Approach to Criminal Law*, 195, at 242 *et seq.*; also the new *Kenny*, 122 *et seq.*

61 Per Wrottesley J. in *R. v. Jarmain*, [1946] K.B. 74, at 80.

62 *Op. cit.*, 38.

63 See the recommendations of the Royal Commission on Capital Punishment (September 1953), Cmd. 8932.

is adopted, discussion of the merits and demerits of such rules as the constructive murder rule is transferred from the plane of legal analysis to another plane altogether, if not another dimension, namely, the plane of criminal policy. Mr. Turner has taken the lead in emphasising the difference between criminal law, criminal science, and crimnal policy,[64] but in his fervent advocacy of purity of legal principle he often appears to lose sight of the influence of criminal policy on the criminal law. The object of the realists is to resist this tendency, and show that the criminal law is in fact an instrument of criminal policy, which accounts for many of its imperfections.[65]

In the United States there is a much more widespread realisation that the purely historical and analytical method of studying criminal law is outmoded, and that the rules of criminal law must be viewed in the context of their social purpose as well as in the light of history and the theoretical analysis of principles. It is not suggested that we should emulate everything which has been done in this direction by the American writers. Nor is the writer oblivious to the possibility that the path of progress lies through the purist camp, and that realism in this connection may be nothing more than a conservative force. But it is desired to emphasise the need to pay more attention to non-legal considerations in discussing the criminal law. It has been said that "the study of the substantive criminal law as an exercise in legal dialectic must be supplemented by consideration of it as a social institution."[66] This approach alone, it is submitted, will enable us to understand what otherwise appears to be a "sort of game of chess in the dark on a board on which the squares are apt to vary",[67] that is, the Criminal Law.

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64 See the new *Kenny*, 5.

65 Lord Goddard's lecture on *The Working of the Court of Criminal Appeal*, delivered to the Society of Public Teachers of Law, and printed in the Society's Journal, Vol. II, No. I, 1952, pp. 1-9, is well worth studying from this angle.

66 Livingston Hall and Sheldon Glueck, *Cases on Criminal Law and its Enforcement* (2nd. edn., 1951), 3.

67 This is Professor Seaborne Davies' description, in his Broadcast Talk on *Reform of the Criminal Law*, reprinted, with the others in the same series, under the title *Law Reform and Law Making*, 1953.

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