CONSTRUCTIVE MURDER IN CANADIAN AND ENGLISH LAW

After a long period of stagnation in the reform of English substantive criminal law, two recent events herald a significant change of attitude on the part of the Administration. Following several bitterly conducted debates on the issue of capital punishment during the post-war sessions of Parliament, the seemingly irreconcilable views of the Lords and Commons were almost miraculously resolved in 1957 by the passing of the Homicide Act.[1] In addition to introducing into English Law the dubious classification of capital and non-capital murder,[2] this enactment gave effect to certain recommendations of the Royal Commission on Capital Punishment, 1949-1953, with regard to provocation,[3] suicide pacts[4] and the mental element in murder.[5] The appetites of would-be

1. 5 and 6 Eliz. 2, c.ll. For a valuable historical background to the passage of this statute, outlining the previous attempts to abolish the death penalty in Great Britain, see the excellent article by Sidney Prevezer, "The English Homicide Act: A New Attempt to Revise the Law of Murder" (1957) 57 *Columbia L.R.* 624, at pp. 629-633.
2. In its *Report* (Cmd. 8932) the Royal Commission on Capital Punishment had concluded that "it is impracticable to find a satisfactory method of limiting the scope of capital punishment by dividing murder into degrees" (see p. 278, para. 41, and p. 189, para. 534). Undeterred by the arguments put forward by the Royal Commission, the government laid down six categories of murder as still requiring the imposition of the death penalty, *viz.,* murder (1) in the course or furtherance of theft, (2) by shooting or causing an explosion, (3) in resisting a lawful arrest, (4) of a police officer and (5) of a prison officer acting in the execution of his duty, and, finally, (6) where a person commits more than one murder or has been previously convicted of another murder — see Homicide Act, 1957, ss. 5 and 6. This section in the Act, the most controversial of all its provisions, has been severely criticised, as to which see Armitage (1957) *Cambridge LJ.* 183, Prevezer (1957) 57 *Columbia L.R.* 624, 648; Hall Williams, "The Homicide Bill," *The Howard Journal,* 1957; Elliott [1957] Crim. L.R. 282; and the present writer in (1957) 3 *British Journal of Delinquency* 49, 59.
3. *Ibid.,* s.3, adopting the recommendation of the Royal Commission *(Report* p. 56, paras. 151, 152) that no distinction should be drawn between provocation by words and other forms of provocation, a reform which brings English law into line with Canadian law. (See 1955 Criminal Code, s.203(2)). Both systems continue to judge provocation by reference to the standard of the reasonable man, a criterion which is by no means generally acceptable. See Prevezer, *ibid.,* pp. 642-645, Odgers (1954) *Cambridge LJ.* pp. 165-168; and the present writer in [1954] *Crim. L.R.* 898.
4. *Ibid.,* s.4. The Royal Commission had urged changing the law so as to make aiding and abetting or instigating suicide a substantive crime distinct from homicide, a proposal first made in the English Draft Code of 1878, s. 183, and now embodied in the 1955 Canadian Code, *s.* 212. The Homicide Act seeks to achieve this result by adapting the law of manslaughter but maintains the distinction drawn by the Home Secretary, in relation to the exercise of the Royal Prerogative, between "genuine" and "bogus" suicide pacts.
5. As will be shown later in this article, s.l of the Homicide Act, 1957, purports to abolish the doctrine of constructive malice, in accordance with the recommendation of the Royal Commission *(ibid.,* p. 45, para. 121), but rejecting the

Benthamites having been thus whetted by these reforms, the still more recent announcement of the setting-up of a Criminal Law Revision Committee[6] represents a major achievement on the part of those, whether in Parliament, on the Bench or in the university law schools, who have persistently urged the need for reformative measures to rid the criminal law of England of its numerous defects, fictions and technicalities.[7]

The first major subject to be referred to the Committee is the law of larceny and kindred forms of fraud which the White Paper announcing the establishment of the revising body resignedly accepts "has long been recognised to be in need of reform."[8] What must not be forgotten is the fact that recent caustic comments by the former Lord Chief Justice, Lord Goddard, as to the scandalous nature of the English law of larceny,[9] are but the modern echo of similar opinions expressed by the last

view of the latter body that the doctrine should be retained in judging the liability of accomplices *(loc. cit.).* It is noteworthy, however, that the remnants of constructive malice emerge elsewhere in the statute with its classification of capital and non-capital murder (ss. 5 and 6), for whereas circumstances previously gave rise to the application of the doctrine, the same circumstances now operate to classify the killing as capital murder.

6. The establishment of this Standing Committee, under the chairmanship of Lord Justice Sellers, was made known on February 2, 1959, when Mr. R. A. Butler, the Home Secretary, announced in the House of Commons the publication of a White Paper entitled *Penal Practice in a Changing Society* (Cmnd. 645). This states the terms of reference of the Committee as being "to examine such aspects of the criminal law as the Home Secretary may from time to time refer to the Committee, to consider whether the law requires revision, and to make recommendations" *(ibid.,* p. 4). For the composition of this important body, an essential counterpart to the Lord Chancellor's Law Reform Committee which is concerned with the civil law, see *The Times,* February 3, 1959, wherein it is stated that the Committee will normally present their reports in the form of a draft Bill or of draft clauses, and that the services of Parliamentary counsel will be placed at the Committee's disposal to assist in the preparation of drafts.
7. As an example of the value of a co-ordinated effort on the part of law teachers in instigating measures of law reform, and in some way directly responsible for the setting-up of the Sellers Committee, reference may be made to the memorandum submitted to the Lord Chancellor by the Society of Public Teachers of Law setting out the case for the appointment of a Criminal Law Reform Committee — see (1958) 4 *J.S.P.T.L. (N.S.)* pp. 231-232.
8. *Loc. cit.*
9. In *Russell* v. *Smith* [1957] 3 W.L.R. at p. 518 ([1958] 1 Q.B. 27), the Lord Chief Justice referred to criticisms voiced by the editor of the *Law Quarterly Review,* (1956) 72 *L.Q.R.* 183, as to "the utter unreality of the present law of stealing." Cases such as *Moynes* v. *Coopper* [1956] 1 Q.B. 439, involving the same problem as that which arose in *Russell* v. *Smith* and in many other cases before them, observed Dr. Goodhart, "are a public scandal both because the courts are reluctantly compelled to allow dishonesty to go unpunished, and because of the serious waste of judicial time involved in the discussion of futile legal subtleties." Speaking with commendable judicial restraint, Lord Goddard commented: "Those are strong words, no doubt, but it would be a good thing, I think, if the law of larceny could be somewhat simplified and cleared up." *(loc. cit.).*

body appointed to investigate the criminal law of England,[10] namely, the Royal Commission set up in 1878 to consider the law relating to indictable offences, which, in their *Report,* recommended, *inter alia,* simplifying the law of theft by abolishing the many complicated and highly artificial distinctions which are the inevitable concomitants of the old common law rules.[11] It has taken another eighty years for the government of the day to recognise the need for re-examination of the simplified law of theft as propounded by Sir Fitzjames Stephen and incorporated in the Draft Code appended to the Commissioners' Report of 1879.

To countries like Malaya and India, Canada and New Zealand, with codified systems of criminal law, it must frequently be a cause of wonderment why England, which provided in the persons of Lord Macaulay[12] and Fitzjames Stephen the stimulus and single-minded purposefulness which produced, respectively, the Indian Penal Code of 1860[13] and the English Draft Criminal Code of 1879, should have shown itself so obstinately unwilling to benefit from their pioneer work in the field of codification. In a recent lecture to the Selden Society,[14] Dr. Radzinowicz has retraced in lively fashion the massive but abortive efforts during the early part of the nineteenth century to reduce the criminal law of England into one Code. "The only outcome of these stupendous efforts," he observes[15] "were the Criminal Consolidation Acts of 1861 relating to offences against the person and offences against property; and they followed the principle favoured by Peel: the common law remained intact. The movement had spent itself. Even the scheme of assembling in an amended and digested form all statutory provisions on criminal matters and unifying them in one criminal code was derelict."

One further effort, however, remained to be launched, an effort which, though destined to suffer in England the same miserable fate accorded

10. This was the fifth Commission to be appointed during the nineteenth century to advise on the improvement of English criminal law, a brief synopsis of the earlier efforts being given in its *Report* (c. 2345) at pp. 5-6.

11. *Ibid.,* pp. 26-28.

12. An illuminating account of the history leading up to the enactment of the Indian Penal Code, and of the major contribution made by Macaulay in its drafting, is given by G. C. Rankin "The Indian Penal Code" (1944) 60 *L. Q. R.* 37-50. For a more critical assessment of Lord Macaulay's role and efforts see Hari Singh Gour, *The Penal Law of India* (6th ed., 1956), vol. 3, Introduction, pp. cii, ciii.

13. The first Indian Law Commission was appointed in 1834. Macaulay's draft of the Penal Code was published in 1836, and subsequently revised. The Penal Code did not become law until 1860, long after the first Indian Law Commission had ceased to exist — see Ilbert, "Indian Codification" (1889) 5 *L.Q.R.* 347.

14. The sixth of a series of annual Selden Society Lectures, Dr. Radzinowicz's paper entitled "Sir James Fitzjames Stephen, 1829-1894, and his Contribution to the Development of Criminal Law" contains what is undoubtedly the most exhaustive bibliography ever collated of Fitzjames Stephen's published writings, bills and judicial decisions. It was published in 1957 by the Selden Society.

15. *Ibid.,* p. 18.

to its predecessors, saw its memorial in the criminal codes of Canada,[16] New Zealand[17] and several of the Australian states.[18] Behind this last venture to codify the English criminal law stood the crusading figure of Fitzjames Stephen, whose Criminal Code (Indictable Offences) Bill of 1878[19] has been described as "surpassing anything ever attempted in this country by one man or by any one commission."[20] Following its introduction into Parliament it was promptly referred to a Royal Commission which, largely through the indefatigable efforts of Fitzjames Stephen, himself a member of the Commission,[21] completed its task in the short space of seven months. As an appendix to its Report of 1879 the Commissioners put forward a refurbished Draft Criminal Code.[22] From that day up to the present, so far as English law is concerned, its provisions have languished in comparative obscurity but other countries, notably Canada, soon recognised the intrinsic merits of the English Draft Code and modelled their own criminal law upon it.

The first Canadian Criminal Code was enacted in 1892,[23] since when it has been subjected to an infinite variety of amendments, thus con-

16. The revised Criminal Code of Canada, (1953-4, 2-3 Elizabeth II, c. 51) received the Royal Assent on June 26, 1954, and came into force on April 1, 1955. Henceforth, this will be referred to as the 1955 Criminal Code.
17. At present this is contained in the Crimes Act of 1908, which is a re-enactment of the original criminal code which was enacted in New Zealand in 1893. On October 24,1957, a new Crimes Bill was introduced in the House of Representatives by the Attorney-General, which represents the first major revision of the code since 1893. For some comments on the Bill see I. D. Campbell [1958] *Crim. L.R.* 108.
18. Thus the Tasmanian, Queensland and Western Australian criminal codes are all based on the English Draft Criminal Code of 1879, the other states following the common law. For an interesting account of the diverse paths followed by the respective states see J. V. Barry and G. W. Paton, *"An Introduction to the Criminal in Australia,"* vol. VI of *English Studies in Criminal Science,* pp. 1-22.
19. For an account of how this Bill came to be drafted by Fitzjames Stephen, using his *Digest of the Criminal Law,* published in 1877, as the foundation, see his *History of the Criminal Law,* vol. I, Preface pp. vi, vii.
20. Radzinowicz, *ibid.,* p. 20.
21. See note 10, *supra.* Stephen's elevation to a judgeship in the Queen's Bench Division was announced during his work as Commissioner. The other members of the Royal Commission were Lord Blackburn, Lord Justice Lush, and Mr. Justice Barry of the High Court of Ireland.
22. As to its fate when introduced in the House of Commons in 1880, see Chalmers, "An Experiment in Codification" (1886) 2 *L.Q.R. 125,* 126.
23. 55 & 56 Vict. (Dom.) c. 29, which came into force on July 1, 1893. Henceforth this will be referred to as the 1892 Criminal Code. In 1906, on the general revision of the statutes of Canada, the Criminal Code and its amendments were consolidated (R.S.C. 1906, c. 146), to be followed in 1927 by a further consolidating measure (R.S.C. 1927, c. 36). Henceforth this will be referred to as the 1927 Criminal Code. Several amending enactments introduced between 1927 and 1953 called for a further revision of the Code which eventually received legislative approval in 1954. (Statutes of Canada 1953-54, c. 51). For a valuable survey of the background leading up to the introduction of a criminal code in Canada, see Crouse, "A Critique of Canadian Criminal Legislation" (1934) 9 *Canadian Bar Rev.* 545, at pp. 546-563.

founding those critics of codification who argue against such a system on the basis of its inflexibility. At the same time by its increasing number of anomalies and inconsistencies, a consequence of legislative patching, the original Code gave considerable cause for questioning the advantages, such as certainty and explicitness, normally claimed as the hallmarks of a code.[24] By the end of the second world-war the time was ripe for instituting a full scale overhaul of the Code[25] and eventually in 1954 a new Code was enacted,[26] replacing altogether the old Code of 1892. To attempt a comparative survey of the entire field of Canadian and English criminal law in the light of recent developments would undoubtedly prove rewarding. The limited object of this article, however, is to consider the position in Canadian law of the doctrine of constructive murder which, for long regarded as a standing reproach to the criminal law of England,[27] was finally abolished in Great Britain by the Homicide

24. Of the considerable writings published on the controversial subject of codification, it is surprising how little attention has been paid to the able exposition of the case in favour of codification by the English Criminal Law Commissioners in their 1879 *Report* (c. 2345), at pp. 6-9.

25. The task of preparing a new consolidated Code was assigned to a Royal Commission, appointed in 1949, consisting of the Chief Justice of Saskatchewan, a High Court judge from Ontario and the Deputy Minister of Justice, with the assistance of a committee composed mainly of practising lawyers. It soon became apparent that judicial duties and the demands of law practices made it impossible for some of the members to devote the large amount of time necessary to get the work of the Commission completed. Accordingly, in May, 1951, a second Commission, again headed by the Hon. W. M. Martin, Chief Justice of Saskatchewan, was appointed and proceeded to complete its task. Its *Report,* a disappointing document, accompanied by the draft Bill revising the Code, was signed in February, 1952. Together with the reports of the Senate Special Committee which considered the Bill in the Session 1952-53, it was eventually published (The Queen's Printer, Ottawa) in 1954. For an informative and detailed account of the work preliminary to the enactment of the 1955 Criminal Code, see A. J. MacLeod and J. C. Martin, "The Revision of the Criminal Code" (1955) 33 *Can. B.R.* 3.

26. Statutes of Canada, 1953-54, c. 51. Proclaimed to come into force on April 1, 1955 — see *Canada Gazette,* Oct. 2, 1954, vol. 88, p. 3297. A selective but valuable survey of some of the changes introduced by the 1955 Code, in relation to offences, punishment and procedure, is contained in a series of articles in (1955) 33 *Can. B.R.* pp. 20-40, 41-62, by Mr. J. C. Martin, Research Counsel to the Royal Commission to Revise the Criminal Code, and Mr. A. J. MacLeod, Director of the Criminal Law Section of the Department of Justice, Ottawa, also the draftsman responsible for the Bill revising the Criminal Code.

27. See the views expressed, for example, by the English Royal Commission on Capital Punishment, *Report* (Cmd. 8932), p. 34, para. 93, and cf. the strong words used in 1878 by the Attorney-General, Sir John Holker (afterwards Lord Justice Holker) when introducing into Parliament Fitzjames Stephen's Draft Code Bill: "It seems to me that murder by construction of law is a disgrace to the juridical system of the country, and should no longer be retained" (Parliamentary Debates, 1878, Third Series, vol. 239, col. 1946). See, too, Macaulay's criticism — Draft Indian Penal Code, Appendix, note M — which Dr. Glanville Williams suggests "may stand as a model for any reformer who wishes to argue for expunging the doctrine of constructive homicide from the law" [1957] *Crim. L.R.* at p. 294.

Act, 1957.[28] The present writer is firmly convinced that such a course should now be followed by Canadian criminal law and states his reasons for advocating such a measure of reform.

Our first concern then must be to examine the historical development in Canadian law of the doctrine of constructive murder. The logical starting point is the 1892 Code which, a study of the wording used in the respective relevant sections[29] clearly shows, followed verbatim the relevant provisions in the English Draft Code of 1879. This declared that, in the case of certain heinous offences,[30] culpable homicide is to be regarded as murder, "whether the offender means or not death to ensue, or knows or not that death is likely to ensue.

(a) *if he means to inflict grievous bodily injury* for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(b) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(c) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath."[31]

It will be observed that in the case of paragraphs (b) and (c) the question of knowledge of the danger involved in such conduct is irrelevant, the liability for murder in these circumstances being absolute. In the basic paragraph (a), however, whether the accused intended to kill or knew that death was likely to ensue, it is essential to prove on his part an intention to inflict grievous bodily injury. The mere fact of killing

28. 5 & 6 Eliz. 2, c. 11. For constitutional reasons the statute was not extended to Northern Ireland — see Edwards, "Capital Punishment in Northern Ireland" [1956] *Crim. L.R.* at p. 751.

29. Cf. s. 175 of the Draft English Code [c. 2345 at p. 100], section 228 in the 1898 Criminal Code and section 260 in the 1927 Code. In the revised Code of 1955 it appears, with a substantial amendment, as s. 202.

30. Treason and other offences against the Queen's authority and person (the latter are enumerated in Part V of the Draft Code and include arson of H.M. dockyards, ships, military stores, etc., assaults on the Queen and incitement to mutiny — the same offences are to be found in Part II of the 1892 Canadian Criminal Code, but the 1955 Code refers only to treason and sabotage); piracy and offences deemed to be piracy; escape or rescue from prison or lawful custody; resisting lawful apprehension; murder (a marginal note in the Draft Code explains that this was inserted in order to cover the case where the grievous bodily harm is done to some person other than the person intended to be murdered — it was also included in the 1892 Canadian Code but is omitted from the 1955 Code); rape; forcible abduction; robbery; burglary; and arson. To this list, so far as Canadian law is concerned, the offence of indecent assault was added by 1947, c. 55, s.6, thus meeting the criticism that it is sometimes difficult to decide whether certain facts constitute rape or indecent assault, as to which see the observations of Humphries, J. before the English Royal Commission on Capital Punishment, *Minutes of Evidence,* p. 260 (6).

31. *Loc. cit.* The writer's italics.

in the course of committing any of the enumerated offences is not enough to invoke the doctrine of constructive murder. Superimposed on such a condition is the requirement of an intent "to inflict grievous bodily injury." The relevance of this element of liability will be seen more clearly later when we turn to examine, first, the reform instituted in English law by the Homicide Act, 1957, and secondly, the change effected in the revised Canadian Criminal Code of 1955. As the English Commissioners rightly perceived in 1879,[32] the cases included within the constructive murder section of the Draft Code would all fall within the definition of murder originally propounded by Stephen in his Criminal Code (Indictable Offences) Bill, according to which it is murder if the offender "intended to cause, or knew that he probably would cause *grievous bodily harm* to any person." [33]

In view of the controversy which this phrase "grievous bodily harm" has engendered in English law in recent years it will be as well to study carefully the interpretation placed upon it by the English Criminal Law Commissioners. It will assist if we consider for a moment the complementary section to that dealing with constructive murder. This section,[34] which applies in cases where no question of constructive malice is involved, was also embodied unaltered in the 1892 Canadian Code[35] and is repeated with only minor textual alterations in the 1955 Code.[36] It provides that "culpable homicide is murder:

> (a) if the offender means to cause the death of the person killed; or
>
> (b) if the offender *means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death,* and if the offender is reckless whether death ensues or not..."

Commenting on their replacement of Fitzjames Stephen's formula "means to cause grievous bodily harm" by the italicised words quoted above, the Criminal Law Commissioners declared,[37] without any explanation, that the revised wording "to some extent narrows" the definition given in Stephen's Criminal Code (Indictable Offences) Bill. It will, however, have been observed earlier that the English Draft Code resorts to the concept of "grievous bodily injury" in the section dealing with constructive murder arising out of a killing in the commission of certain heinous offences.[38] That in reality both formulae were designed to cover the same circumstances becomes apparent from a close study of the Report of the English Commissioners [39] wherein, it is suggested,

32. C. 2345 at p. 24.
33. *Loc. cit.* The writer's italics.
34. English Draft Code, s. 174.
35. S. 227, re-enacted in the 1927 Criminal Code, s. 259.
36. S. 201. The writer's italics.
37. *Ibid.,* p. 24.
38. See notes 29 and 31 *supra.*
39. Considerable attention is given to this point in the *Report,* at p. 24. It is worth observing also that Fitzjames Stephen in his analysis of the Draft Code (see his *History of the Criminal Law,* vol. III, pp. 79-84) observes that "I do

the view is taken that proof of an intention to do grievous bodily injury [or harm] to another person *per se* envisages proof of an intention to do bodily injury which is known to the offender to be likely to cause death. By thus requiring in cases of constructive murder proof of an intention to inflict bodily injury of a degree falling just short of fatal injury, both the English Draft Code and the 1892 Canadian Criminal Code might favourably be understood to have countered the long-standing criticisms levelled against the principle of strict liability which is nowhere exemplified better than in the case of constructive murder.

Quite illogically, however, both Codes then proceed to dispense totally with the requirement of *mens rea,* even its lesser form of an intent to inflict grievous bodily injury, where the accused, in seeking to achieve his ulterior purpose of committing one of the enumerated offences or effecting his escape, chooses to administer a stupefying or overpowering drug or to wilfully stop the breath of his victim.[40] In other words, the extent of the criminal liability for murder is made to depend not on the intention of the accused but simply on the methods he uses to achieve his ends. An illustration may help to indicate the absurdity of the position originally conceived in the English Draft Code and since perpetuated in both the original and revised versions of the Canadian Criminal Code. Assuming the accused sets about effecting his criminal purpose of committing one of the enumerated heinous crimes by means of physical violence in the form of raining blows, shooting or stabbing his victim, he can only be convicted of murder if it is shown that he intended to do his victim such bodily injury as is likely to cause death. Assuming, on the other hand, that the method adopted by the accused is that of drugging or gagging his victim, no matter how little physical violence is actually offered by the accused, if his victim dies as a result the accused is held absolutely liable.

In 1947 the constructive murder section of the Canadian Code was amended by the addition of a paragraph which, like the provisions criticised above, appears to be a strange bedfellow indeed to the initial paragraph which requires proof of an intent to do grievous bodily injury.

not think that section 175 *(a)* [the section dealing with constructive murder]... adds anything of importance to the provisions of section 174," adding later "I think, in short, that section 174 reproduces in plain language that part of the existing law which would be in harmony with the common standard of moral feeling: it describes in perfectly unambiguous language all the worst and most dangerous cases of homicide" *(ibid.,* pp. 83, 84). Lord Goddard C.J. expressed much the same views in his evidence before the Royal Commission on Capital Punishment — see *Minutes of Evidence,* p. 246 (5), Q. 3133-42, 3161-75. And the learned editor of Russell on *Crime* adds a final word as to sections 174 and 175 (a): "They read surprisingly like the result of a conflict between incompatible views, stubbornly maintained by two opposed groups of the Commissioners, which has thus emerged as an illogical compromise *(ibid.,* vol. I, p. 552, n. 31).

40. S. 175 *(b)* and (c) in the English Draft Code; s.228 *(b)* and (c) in the 1892 Canadian Code, and s. 202 *(b)* and (c) in the 1955 Code. For the actual wording of these provisions see note 31, *supra.*

Described with justification by one Canadian commentator[41] as embodying a "savage doctrine," the 1947 amendment[42] provides that it is murder, whether the offender means or not death to ensue or knows or not that death is likely to ensue "if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence [of its use]."[43] It is savage, explains the same commentator,[44] because it solemnly proposes to hang an armed robber whose only connection with the death is that he pulled the gun out of his pocket and the gun happened to go off and kill someone while he was at the scene of the crime or departing from it; even if he pulled the gun out to make it safe by taking the bullets out of it, or to throw it away and it went off and killed someone, that would still be murder under the present section. A similar high water-mark in the doctrine of constructive murder was reached in English law about the same time with the decision of the Court of Criminal Appeal in *R.* v. *Jarmain*[45] where Wrottesley J., delivering the judgment of the court, declared:[46] "We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result even inadvertently in the death of the victim. For this purpose the use of a loaded firearm, in order to frighten the person victimised into submission, is a violent measure." This, it must be emphasised, is a very different view of the law from that prevailing

41. John Willis, (1951) 29 *Can. B.R.* 784 at p. 793, in a vehement criticism of the decision of the Supreme Court of Canada in *Rowe* v. *The King* [1951] S.C.R. 713, [1951] 4 D.L.R. 238, wherein it was held (1) that a jury is entitled to find that an accused who is not being pursued and has put a hundred miles and several hours between him and his crime is still "in flight upon the commission" of the crime, the subjective realisation by the accused that he may be apprehended being sufficient, (2) that where the accused had the revolver upon his person, pulled it out, held it in his hand and the death of the victim ensued as a consequence that was a sufficient "use of a weapon" even though the actual discharge of such revolver was accidental. The learned writer's comparison with the interpretation placed on the phrase "in the course or furtherance of" a felony of violence in English law must now be read subject to the decisions in *R.* v. *Stokes* [1958] *Crim. L.R.* 688, and *R.* v. *Jones* [1959] *Crim. L.R.* 291. Professor Willis's note is especially illuminating on the Parliamentary origin of this particular amendment.
42. 1947, c. 55, s.7. Responsible for the introduction of this amendment to the Code was the decision of the Supreme Court of Canada in *R.* v. *Hughes et al* [1942] S.C.R. 517 as to which see *Rowe (supra) per* Kerwin, J. at p. 717, and *per* Cartwright, J. at p. 724. In effect, the Supreme Court in *Hughes* held that a verdict of manslaughter was called for if it was established that the discharge of the revolver was accidental.
43. In the revised Code of 1955, s. 202 *(d),* the words in brackets "of its use" are omitted, thus bringing the provision into line with the decision in *Rowe (supra).*
44. *Ibid.,* p. 794.
45. [1946] K.B. 74.
46. *Ibid.,* at p. 80.

at the turn of the century when the tendency was to limit the doctrine of constructive malice to cases where the felonious act was likely to cause death.[47] From 1920 onwards, however, beginning with the judgment of the House of Lords in *D.P.P.* v. *Beard,*[48] continuing with cases like *Betts and Ridley*[49] and *Stone*[50] and culminating with *Jarmain,*[51] there arose a new development in the application of the doctrine, to the effect that where death is caused in the commission of a felony involving violence a lesser degree of violence may justify a verdict of murder than would be necessary in other circumstances.[52] It is only right to point out, however, that Lord Goddard, at the time Lord Chief Justice, in his evidence before the Royal Commission on Capital Punishment,[53] did not seek to sustain the extreme interpretation of the doctrine voiced by the Court of Criminal Appeal in *Jarmain.* Instead, the Lord Chief Justice expressed the view that in the context of constructive murder, reference to a killing by an "act of violence" done in the course of committing a felony involving violence meant no more than saying "such use of force as a man using it realises may endanger life."[54] It is also interesting to note that Lord Goddard went on to suggest that there might well be advantage in redefining murder on the lines of the Draft Criminal Code approved by the English Commissioners in 1879, in such a way as to eliminate constructive malice altogether.[55] Despite the strong representations of the opposing view, with which we shall be concerned later, that the doctrine should be retained in relation to crimes of violence, the Royal Commission, in its Report of 1953, recommended the abolition of the doctrine of constructive murder.[56]

This has now been effected, so far as English law is concerned, by the Homicide Act, 1957, though the language used by the parliamentary draftsman to achieve this laudable end may justly be described as somewhat ambiguous. Thus, section 1(1) of the Act provides:

47. Cases illustrative of this trend include *R.* v. *Serne* (1887) 16 Cox C.C. 311; *R.* v. *Whitmarsh* (1898) 62 J.P. 711; *R.* v. *Bottomley* (1903) 115 L.T.J. 88; and *R.* v. *Lumley* (1911) 22 Cox C.C. 635.

48. [1920] A.C. 479.

49. (1930) 22 Cr. App. Rep. 148.

50. (1937) 53 T.L.R. 1046.

51. [1946] K.B. 74.

52. In *R.* v. *Grant and Gilbert* (1954) 38 Cr. App. Rep. 107, the Court of Criminal Appeal applied the doctrine to a case of death arising in the course of committing larceny in a dwelling-house, itself not a felony involving personal violence, but in this case the appellants were shown to have had the preconceived intention of offering violence if it should prove necessary.

53. Cmd. 8932, p. 32, para. 87.

54. *Minutes of Evidence,* p. 252. The attitude of the former Lord Chief Justice is clearly discernible in the series of replies given by him before the Royal Commission, and usefully collated by Mr. J. W. C. Turner in [1958] *Crim. L.R.* pp. 20-21.

55. *Loc. cit.*

56. *Ibid.,* p. 45, para. 121, and p. 41, para. 111.

"Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

Although no reference is made in the text of the statute to the abolition of constructive malice, several extrinsic indicia show beyond any shadow of doubt that this was the underlying purpose of the above provision. In the first place, an explicit statement to this effect appeared in the explanatory memorandum accompanying the Bill when it was first published. Secondly, whilst recognising the true place of marginal notes in interpreting a statute, it is noteworthy that the words "abolition of constructive malice" appeared in the margin opposite the text of clause 1(1) of the Bill and are retained in the statute. Thirdly, during the Committee stage of the Bill's passage through the House of Commons the Attorney-General (Sir Reginald Manningham-Buller) declared that the intention behind clause 1(1) was not to make an alteration in the definition of murder but to get rid of the doctrine of constructive murder.[57] He added that, in future, in all cases of murder what must be proved is either an intention to cause death or an intention to do grievous bodily harm.[58]

That this statement correctly represents the principles governing liability for murder under English law, following the Homicide Act, 1957, was made clear in a reserved judgment of the Court of Criminal Appeal in *R.* v. *Vickers.*[59] Lord Goddard C.J., in that case, explained away the difference between *implied malice,* which is retained under section 1(1), and *constructive malice,* which the same provision purports to abolish, a distinction which might well drive the ordinary layman into a state of exasperation with the niceties of the law. With respect, however, it hardly justifies the learned editor of *Russell on Crime*[60] maintaining an attitude of surprised ignorance that modern criminal law recognised an essential difference between the two concepts in the context of murder. As the Lord Chief Justice explained:[61] " 'Constructive malice' is an

57. Sec. 561 H.C. Deb., cols. 250, 251; January 23, 1957.

58. See 561 H.C. Deb., col. 269; November 27, 1956.

59. [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; (1957) 41 Cr. App. Rep. 189.

60. In a penetrating analysis of *Vickers,* "Malice Implied and Constructive" [1958] *Crim. L.R.* 15., Mr. J. W. C. Turner elaborates on the views subsequently expressed by himself in a necessarily condensed form in Russell on *Crime* (11th ed.) at pp. 557-560 and 571-574. Reference should also be made to a forthright condemnation of Mr. Turner's interpretation of s. 1(1) of the Homicide Act, 1957, in [1958] *Crim. L.R.* 714-721, the anonymous author, with whom the present writer respectfully agrees, preferring the construction adopted by the Court of Criminal Appeal. This in no way minimises the force of much of Mr. Turner's criticisms, particularly, as will be shown later, in relation to the court's interpretation of the phrase "grievous bodily harm" in the context of murder, and to its apparent leaning towards an objective test of liability.

61. [1957] 3 W.L.R. 328.

expression which I do not think will be found in any particular decision[62] but it is to be found in the textbooks, and is something different from 'implied malice'. The expression 'constructive malice' is generally used where a person causes death during the course of carrying out a felony which involves violence[63] — that always amounted to murder... Another instance of constructive malice which was always held sufficient to amount to murder was...if a person was resisting arrest before the Act of 1957 and caused the death of a police officer, although he might only have used a little violence on the officer he was guilty of murder[64]... Malice aforethought is a term of art. It has always been defined in English law as either an express intention to kill...or implied, where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim and the victim died as a result."

With the enactment of the Homicide Act the distinction between constructive malice and implied malice ceases to have any importance in English law, so far as the standards of liability are concerned, every case of murder being judged by the same criteria. Thus, whether the killing is done in the course of committing a felony or other offence involving violence or no violence, or of resisting arrest, whatever means are used to accomplish the end result and no matter who the victim may be, the mental element to be proved is exactly the same in every case. The Crown must prove that the offender either intended to kill or intended to inflict grievous bodily harm or that he knew that by his conduct he probably would cause death or grievous bodily harm. In effect, therefore, English law has turned full cycle and is now back at the point in 1878 where Fitzjames Stephen advocated in his Criminal Code (Indictable Offences) Bill these very same criteria for determining liability in all cases of murder.[65] The English Commissioners, unfortunately, in their Draft Code saw fit to restrict Stephen's proposals in the so-called exceptional cases of drugging and gagging and these incongruous and illogical qualifications were duly embodied in the Canadian Criminal Code of 1892. It is, however, important to realize that prior to 1955 when the revised Code was introduced — always excepting the cases of drugging and gagging and the 1947 amendment — the Canadian law of constructive murder required the very same *mens rea* which is now part of the reformed English law of murder.

To better understand the significance of the change introduced into Canadian law by the revised Criminal Code of 1955 it is necessary to

62. Mr. Turner draws attention to three cases in which the terms constructive malice" and "constructive murder" have been used — see [1958] *Crim. L.R.* p. 17, n. 16.

63. See notes 48-51, *supra.*

64. The most recent instance of the application of this principle in English law was the case of *R.* v. *Craig and Bentley, The Times* newspaper, December 12, 1952.

65. See note 37, *supra.*

make a closer examination of the interpretation given by both English and Canadian courts to the phrase "grievous bodily harm." We have already noted that the English Commissioners in 1879, in defining murder, equated "grievous bodily injury [or harm]" with "any bodily injury known to the offender to be likely to cause death." English judges, however, in recent years have not infrequently departed widely from this criterion of what amounts to "grievous bodily harm [or injury]," adopting instead in the context of murder the interpretation given to the same phrase in the context of the less serious crimes contained in the Offences Against the Person Act, 1861.[66] For the purposes of the statute of 1861 English courts[67] have consistently laid it down that bodily harm to qualify as grievous bodily harm does not have to be such as endangers life. Indeed, it need not be permanent or dangerous provided it seriously interferes with health or comfort, and even then it need only be for a limited period of time. The application of these criteria in defining the mental element in murder was noted by the present writer[68] in 1952 in the case of *R. v. Bloom*[69] where Hallett J., in explaining the nature of grievous bodily harm to the jury, relied on the definition "any injury which seriously interferes with the health or comfort of the person injured." Despite this wide interpretation the jury returned a verdict of manslaughter. In marked contrast, in *R.* v. *Thomas,*[70] also involving a charge of murder, Devlin J. appears to have adopted the prosecution's interpretation of grievous bodily harm as signifying "at least terrible injury" to the victim. And the same judge, writing extra-judicially[71] and consequently perhaps not achieving the prominence which his remarks deserved, has drawn attention to the widening of the area of murder because of the meaning which lawyers have constructed for the term "grievous bodily harm." Graphically,

66. The phrase occurs in six sections of the 1861 Act, *viz.,* ss. 18, 20, 23, 28, 29 and 31. It also appears in the Homicide Act, 1957, *s.* 5(2), but in neither of these enactments is there a statutory interpretation of the phrase.
67. See *R.* v. *Ashman* (1858) 1 F. & F. 88, and *R.* v. *Cox* (1818) R. & R. 362, which authorities are constantly relied on by the leading treatises in this connection — Russell on *Crime* (11th ed.), p. 557, and Archbold, *Pleading and Practice* (34th ed.), p. 1016, para. 2654.
68. (1952) 15 *M.L.R.* 345, 346.
69. *The Times* newspaper, February 7, 1952.
70. [1949] 2 All E.R. 662.
71. "Criminal Responsibility and Punishment: Functions of Judge and Jury" [1954] *Crim. L.R.* 661, in the course of which the learned judge expresses strong opposition to the perpetuation of the doctrine of constructive malice and argues for the exclusion from the ambit of murder even of cases where a man deliberately commits an act of grievous bodily harm and chooses to run the risk of endangering life. To the question, ought he not to be held liable for the consequences? Devlin, J. observes: "The answer...is that he is in any event held liable for the consequences, that is to say, he may be found guilty of manslaughter or causing grievous bodily harm with intent, and for either offence may be sentenced to imprisonment for life. The question is not whether he should be exempt from the consequences, but whether his degree of guilt should be equated with that of a man who deliberately intended the consequences" *(ibid.,* pp. 669-670).

Devlin J. explains: [72] "This [term] is not, as a layman might think, confined to cases of really grave injury. Grievous in the eyes of the law means any harm which seriously interferes with health or comfort. Thus, quite a small blow, which was not designed to have fatal consequences, one from which death followed as the result of an accident, might amount in law to murder. Murder by pin prick is not a legal impossibility."

This warning has passed, apparently, unheeded for in the case of *Vickers,* already referred to, the English Court of Criminal Appeal described as "impeccable" [73] Hinchcliffe J.,'s direction to the jury in the course of which he declared: [74] "Malice will be implied, if the victim was killed by a voluntary act of the accused...done with the intention to kill or to do some grievous bodily harm. The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim... Ask yourselves: Is it proved that the accused man killed Miss Duckett with malice, that is, when he struck the blow he intended to do her serious bodily harm?" Taken on its own this last sentence might be thought to equate the epithets "grievous" and "serious" in describing bodily harm which endangers the life of the victim. Related, however, as it must be, to the entire passage in the trial judge's direction, we are faced with the disturbing fact that, in a reserved judgment, the English Court of Criminal Appeal has expressed its unequivocal approval of the term "grievous bodily harm" being given the same meaning in cases of murder under the Homicide Act, 1957, as that accorded to the phrase in the lesser field of statutory crimes under the Offences Against the Person Act, 1861. [75] In thus extending the definition of grievous

72. *Ibid.,* p. 669.
73. [1957] 3 W.L.R. 326, at p. 329, [1957] 2 Q.B. 664). It is interesting to note that Devlin J. was a member of the Court of Criminal Appeal at its first hearing of the appeal when there was not unanimity among the members of the court. This necessitated the re-arguing of the case before a full court of five judges (Lord Goddard C.J. and Byrne and Devlin JJ. (the original court) together with Hilbury and Slade JJ.). The reserved judgment delivered on the later hearing was said by the Lord Chief Justice to be agreed to by *all* the members of the court.
74. *Loc. cit.*
75. For a recent example of the same practice in the Supreme Court of Canada, see *Cathro* v. *The Queen* (1955) 113 Can. C.C. 225, *per* Fauteux, J., at p. 247 It is interesting to note, however, that the Royal Commission on Capital Punishment *(Report,* p. 162, para. 472), in adverting to this same question, found it difficult to believe that the intentional infliction of such an injury as "sensibly to interfere with health or comfort" necessarily involves "wilful exposure of life to peril," (a phrase used in the Fourth Report of the English Criminal Law Commissioners in 1839: *Parliamentary Papers,* XIX, 235, p. xxiv). They added: "...we are therefore disposed to think that it is too wide a criterion to support a charge of murder." At the same time, it is only right to point out, the Commission did not conceive that any great difference in the day-to-day administration of the law would ensue from the substitution of "serious bodily injury" or injury "endangering life" as the relevant criterion *(loc. cit.).* With respect, the decision of the Court of Criminal Appeal in *Vickers* gives cause for some doubt as to the desirability of adopting a complacent attitude towards this matter.

bodily harm into the area of murder the Court of Criminal Appeal has given its sanction to what, it is suggested, is a dangerous principle for it requires little imagination to conceive of cases where the injury intended and inflicted, although it seriously interferes with the victim's comfort, is neither dangerous to life nor indicative of the accused having foreseen the possibility of death.

Now, let us turn to examine the change introduced into the Canadian law of murder by the revised Code of 1955. Prior to its enactment, it will be recalled, the basic paragraph in the section of the code dealing with constructive murder required proof not only of death having been caused in the commission of one of the enumerated crimes but also of an "intent to inflict grievous bodily injury."[76] Furthermore, as has also already been pointed out, the English Criminal Law Commissioners in their Report of 1879 made it abundantly clear that the phrase "intent to inflict grievous bodily injury" in the section of the Draft Code dealing with constructive murder — the same section as was incorporated into the original Canadian Code — was designed to have the same meaning as an "intent to cause bodily harm known to be likely to cause death." [77] The significance of the change introduced under the revised Code of 1955 will, therefore, become readily apparent when it is stated that in cases of constructive murder the Crown is no longer required to prove an intent to do grievous bodily injury, it being sufficient henceforth to establish an *"intent to do bodily harm."* [78]

This would seem to make the law of constructive murder in Canada considerably more severe than it was prior to the enactment of the revised Code; so much so that it may be questioned whether this was really the intention of the legislature. Some light is thrown on this matter by reference to other parts of the Code dealing with offences against the person wherein all reference to the word "grievous" appears to have been omitted but no explanation of this important change was given at any stage of the Bill's passage through Parliament. Valuable back-ground material possibly explaining the action of the parliamentary draftsman is, however, afforded in a commentary written by Research Counsel to the Royal Commission to Revise the Criminal Code.[79] It would appear that some courts had occasionally experienced difficulty in distinguishing between the two offences under the old Code of "inflicting grievous bodily harm" and "occasioning actual bodily harm."[80] That a clear distinction did in fact exist was recognized in many cases, of which it will suffice to refer to *Bazinet v. Bernard,*[81] where a full survey of the Canadian authorities is conducted.

76. See note 31, *supra.*
77. See note 39, *supra.*
78. See s. 202 *(a).* The writer's italics.
79. J. C. Martin, *The Criminal Code of Canada* (1955), pp. 432-440.
80. 1927 Criminal Code, ss. 274 and 295.
81. (1946) 89 Can. C.C. 201. Reference may also be made to *R.* v. *Hostetter* (1902) 7 Can. C.C. 21, and *R.* v. *Taylor and Young* (1923) 40 Can. C.C. 307.

However, in order to surmount any possible difficulties which might arise in future in the interpretation of the two offences, and bearing in mind that both crimes carried the same penalty, the revised Code eliminated the offence of "inflicting grievous bodily harm" on the ground that all cases falling within this description would also be covered by the retained offence of "occasioning bodily harm."[82] From this jumping-off ground the draftsman would then seem to have proceeded to remove the epithet "grievous" from all other offences against the person in which it had previously appeared in the old Code. No far-reaching effects ensue from this course of action except where grievous bodily harm was formerly used conjunctively with death as the consequence intended, as in the section dealing with constructive murder with which we are principally concerned.

It is significant that elsewhere in the Revised Code the expression "grievous bodily harm" is retained, as for example in the section limiting the boundaries of duress as a defence which is limited to "threats of death or grievous bodily harm,"[83] and again in the sections governing self-defence against assault where it is stated that a person is only justified in killing if he believes "that he cannot otherwise preserve himself from death or grievous bodily harm."[84] The assimilation of grievous bodily harm and death in the latter instances reinforces the opinion that the omission of the epithet "grievous" in the section dealing with constructive murder in the revised Code was effected without full awareness on the part of the legislature as to its consequences. Additional evidence in support of this suggestion is contained in section 75 (2) of the revised Code which provides the death penalty for any person who kills another in the course of committing or attempting to commit piracy. This preserves the law as contained in the Code of 1892[85] with unimportant textual amendments. The crime of piracy, it will be recalled, is one of the offences contained in the section dealing with constructive murder,[86] so that we have the incongruous situation where two separate provisions of the Code purport to deal with the same offence. What is

82. 1955 Code, s. 231 (2), which provides: "Every one who unlawfully causes bodily harm to any person or commits an assault that causes bodily harm to any person is guilty of an indictable offence..." The case for merger of the two offences is probably traceable to the judgment of Harvey C.J.A. in *R.* v. *Letendre* (1928) 50 C.C.C. 419, at pp. 420-421: see Martin, *ibid.,* p. 435.

83. 1955 Code, s.17. This is all the more striking insomuch as the phrase "causing grievous bodily harm" is omitted and the words "causing bodily harm" are substituted in describing the offence which, together with other such crimes as murder, robbery and arson, is declared to be outside the ambit of duress as a defence. Cf. 1927 Code, s.20.

84. 1955 Code, s. 34(1) and (2).

85. 1892 Code, s. 129; 1927 Code, s. 139.

86. See note 30, *supra*.

revealing and unjust is that the liability of the accused for murder may depend on whether he is charged with constructive murder in the course of piracy under section 202 when the Crown need only prove "an intent to cause bodily harm," or, alternatively, under section 75(2) when the Crown must prove "an intent to do any act that is likely to endanger the life of another person."

Bearing in mind the historical background of the section in the Code dealing with constructive murder it is suggested that, prior to 1955, what the Code envisaged in requiring proof of an "intent to do grievous bodily injury" was proof of some terrible injury which normally might be expected to have fatal consequences or, to use the original words of the English Commissioners, an "intent to cause bodily harm known to be likely to cause death." Following the change introduced by the 1955 Code, whereby all that is required is "an intent to do bodily harm," the Crown is no longer required to show that the accused intended to imperil another's life. Henceforth, for the purposes of constructive murder, it is sufficient to show that the accused, in the course of committing one of the crimes listed, for example, struck a blow with his fist, caused a superficial laceration, pushed, shook or tripped up his victim, which conduct, through some inherent constitutional weakness on the part of the victim, results in the latter's death. It has been suggested by one learned English writer[87] that any one of these facts would fall within the ambit of "an intent to do grievous bodily harm" for the purposes of the English law of murder. Whether Canadian judges, prior to 1955, chose to adopt a similar interpretation of "grievous bodily injury" in the context of constructive murder, it is difficult to avoid the conclusion that, under the revised Code of 1955, with the elimination of the qualifying epithet "grievous," such an interpretation of the Canadian Code is at present perfectly tenable. If this is so, it is well to realise the considerable expansion which has now been effected in the application of the Canadian law of constructive murder, a step which is all the more striking in the light of the English decision to abolish the doctrine altogether.

Looking further afield, the Indian Penal Code[88] during its century of existence has contained no provisions resembling the former English, or the modern Canadian, doctrine of constructive murder, and this is also

87. J. W. C. Turner in [1958] *Crim. L.R.* at pp. 28-29, n. 51.

88. Ss. 299 and 300, quoted in full in the *Report* of the English Royal Commission on Capital Punishment, App. 11, p. 434. Exhaustive analyses of the relevant sections, which draw a distinction between culpable homicide and murder based upon the offender's knowledge and intention, are contained in Hari Singh Gour's, *The Penal Law of India* (6th ed., 1955), vol. 2, pp. 1268-1291; and V. B. Raju's *Commentary on the Penal Code* (1957), pp. 823-893. For an interesting comparison of the Indian Penal Code and Stephen's *Digest* in relation to constructive murder, see S. G. Vesey-Fitzgerald. "The Reform of the Law of Murder" (1949) 2 *Current Legal Problems* 27, at pp. 31-36.

true of Pakistan,[89] Ceylon,[90] the Federation of Malaya[91] and Singapore,[92] whose criminal law is modelled on the Indian Penal Code. Scottish law, likewise, does not recognise the doctrine of constructive malice or anything akin to it, it being stated by the Lord Justice General, in his evidence before the Royal Commission on Capital Punishment, that the position has been practically reached in Scotland whereby only intentional killing constituted murder. [93] And a similar pattern is observable in the countries of Western Europe where the concept of constructive murder is also unknown. [94] On the other hand, the doctrine is given widespread application in the United States of America where it would be reasonable to assume that there is a large preponderance of opinion in favour of retaining the existing law and practice unaltered.[95] In Australia there is a divergence among the laws of the various States, South Australia[96] and Victoria[97] applying the former English common law position, whereas in Queensland,[98] Tasmania[99] and Western Australia,[1] the respective criminal codes are based on the English Draft Code of 1879 and this is also true of New Zealand.[2] But so far as the present writer is aware none of these countries have thought it necessary to increase the severity of the constructive murder provisions along the lines of the Canadian amendments of 1947 and 1955.

The fact that English law, notwithstanding its traditional caution and hesitancy in amending the principles of criminal liability, has at last

89. Penal Code, ss. 299 and 300.
90. Penal Code, s. 294.
91. Penal Code, ss. 299, 300.
92. Penal Code, ss. 299 and 300.
93. Cmd. 8932 at p. 34, para. 92. South African law would seem to approximate closely to this position — see Gardiner and Lansdown, *S.A. Criminal and Procedure* (6th ed.), vol. 2, pp. 1551, 1552.
94. *Ibid.,* p. 43, para. 116.
95. *Ibid.,* p. 42, paras. 114, 115, but cf. Moreland, *Law of Homicide* (1952), pp. 48 (particularly note 33), 49-54, and 217-225, where a full survey of the felony-murder doctrine as found in the statutes of the various states is given. Some indication of the lengths to which such doctrine is pushed in the U.S.A. is given by G. 0. W. Mueller in the 1958 Survey of American Law (1959) 34 *New York Univ. L.R.* at pp. 97-98.
96. Where the process of consolidating the criminal statutes, with a large degree of borrowing from United Kingdom statutes, has not affected the application of the former English common law in relation to murder — see Barry and Paton, *ibid.,* pp. 22-3, and Cmd. 8932, p. 435.
97. For a brief account of an abortive attempt at codification in Victoria, which diverged considerably from the English Draft Code, see Barry and Paton, *ibid.,* pp. 20-21.
98. The Criminal Code Act, 1899, s. 300; the code came into operation in 1901.
99. The Criminal Code Act, 1924, s. 157.
1. The Criminal Code Act, 1913; the original code was enacted in 1902 and mainly follows the Queensland Code. For a general discussion of the Australian codes see Barry and Paton, *ibid.,* pp. 16-21.
2. See Crimes Act, 1908, s. 183, which, like the 1927 Canadian Code, s. 260, follows verbatim the English Draft Code, s. 175.

seen fit to abolish the doctrine of constructive murder prompts the question — What justification exists for its retention in Canadian law, especially in the "new look" given to it by Parliament in 1947 and 1955? Are conditions so very different in Canada from those pertaining in the United Kingdom where, it may be emphasised, the incidence of crimes of personal violence has multiplied in disturbing fashion in the last ten years?[8] In deciding to renounce this widely criticised doctrine the United Kingdom government was well aware of the fears expressed before the Royal Commission on Capital Punishment by representatives of the police who urged the retention of the doctrine in relation to crimes of violence.[4] They maintained that its abolition would prejudice the proper protection of innocent citizens and of police officers in the execution of their duty, and that by limiting the liability to be convicted of murder criminals would take more risks, use more violence and more often carry fire-arms. In the somewhat short interval which has elapsed since the

3. Comparison between the number of persons found guilty of offences against the person in Canada and Great Britain, respectively, during the period 1941-1957 is revealing, as the following table shows:

Year	*Canada*	*Great Britain*
1941	5,142	4,099
1944	5,549	4,976
1945	6,197	5,687
1946	7,784	5,503
1947	7,925	5,892
1948	6,814	7,001
1949	6,408	7,395
1950	6,405	8,147
1951	5,554	8,787
1952	6,015	9,128
1953	6,485	9,420
1954	5,551	9,717
1955	4,897	10,366
1956	4,945	11,328

These figures are taken from, in Canada, the *Annual Statistics of Criminal and Other Offences,* prepared by the Dominion Bureau of Statistics (Queen's Printer, Ottawa), and, in Great Britain, the *Annual Criminal Statistics,* prepared by the Home Office (H.M.S.O., London). There are a few differences between what the Canadian and English statistics regard as offences against the person but these do not alter the general picture presented by the above table. Since the Canadian statistics include sexual offences within the table of offences against the person, the same course has been followed by the present writer in tabulating the English totals. Owing to the unreliable nature of the *Police Statistics* published in Canada, it was not thought advisable to judge the position in the two countries by reference to the number of crimes of violence to the person *known to the police,* it being preferable to base the comparison on the number of persons found guilty of such crimes. Finally, it is worth noting that in the relevant period between 1941 and 1956, the population of Canada increased by 40 %, the actual figures being: 1941 — 11,506,655; 1951 — 14,009,429; 1956 — 16,080,791 — see *Canadian Year Book,* 1957-58, p. 117.

4. *Report,* p. 37, para. 99; p. 38, para. 103.

passing of the Homicide Act, 1957, no striking substantiation of these views has been manifested, the same comment being justified in relation to the abolition of the death penalty as to which much the same fears were expressed. In this regard it is of considerable interest to observe that the then Lord Chief Justice, for long a stout defender of the need for retaining capital punishment, saw no reason to believe that, by abolishing constructive murder, there would arise any serious danger that grave offenders would be inadequately punished.[5]

Perhaps the most plausible case in favour of the doctrine of constructive malice was expressed as long ago as 1839 in the Fourth Report of the English Criminal Law Commissioners, wherein it is stated: [6] "Whilst we think that a mere accidental killing in the endeavour to do an illegal or criminal act, wholly unconnected with any danger or mischief to the person, cannot on any just principle be brought within the scope of the law of murder, it appears to us that the same objections... do not apply with the same force to the case where death is occasioned in the endeavour to commit a crime with violence to the person or habitation of another, and consequently is attended with some degree of risk to the person... The enhanced punishment is justified by one of the main principles of penal laws, namely, the prevention of crimes of violence attended with danger to the person." Approval to this approach was expressed by the subsequent Commissioners in their Report of 1866 [7] but with a narrowing of the principle to cases "where homicide is committed in the perpetration of crimes of great enormity such as murder, rape, arson, burglary, robbery, piracy, escape from custody, resistance to arrest." In such circumstances it was said "malice may be not improperly drawn."

These same offences "of great enormity" found their place in the constructive murder section of the first Canadian Criminal Code,[8] with the later addition of indecent assault.[9] When the doctrine is thus narrowed the objections to it appear less emphatic, and the arguments in its favour seem more acceptable. But, as the English Royal Commission on Capital Punishment perspicaciously observed, this is a difference of degree, not of principle. "We must not allow this," said the *Report,*[10] "to obscure the crucial question whether it is right that a man should be convicted of murder for causing a death which he neither intended to cause nor foresaw that he was likely to cause, solely because he was at the time engaged in committing a crime." To which may be added, in the context of Canadian law, is it right that a man should be

5. *Report,* p. 40, para. 108. For provisional figures for murders, attempt to murder, etc., in 1958, given by the Home Secretary, see *The Daily Telegraph,* 15th May 1959. These figures show fewer murders in 1958 than in 1957.
6. (1839) *Parliamentary Papers,* XIX, 235, p. xxix.
7. *Report,* para. 6, cited in Cmd. 8932, at p. 36.
8. 1892 Criminal Code, s. 228.
9. 1947, c. 55, s. 7.
10. Cmd. 8932, p. 36, para. 97.

convicted of murder where death ensues, however inadvertently, through the accused's having a weapon upon his person, not necessarily using it, while engaged in committing a crime or during his flight after committing the crime?

One thing is quite clear, namely, that such a doctrine is totally inconsistent with the subjective test of criminal liability. In any form of proof it is well recognised that a man's state of mind may have to be inferred, a principle embodied in the well known maxim that a person may be presumed to intend the natural consequences of his conduct.[11] If, on the facts, the proper inference is that the accused knew and appreciated that death or serious bodily injury would be the consequence of his act, it is right that he should be convicted of murder. But if that is not the proper inference, if by application of the general presumption the accused's state of mind cannot be shown to have harboured the necessary intent or foresight, the pretence of attributing such intent by invoking the doctrine of constructive malice is completely alien to the accepted basic principles of criminal liability. If this reasoning is correct it must follow that the justification for retaining the doctrine must be on the grounds of public policy, which, it is suggested, means that it must be clearly established that constructive murder under the Code is essential for the protection of the public.

An attempt has been made in this article to indicate the illogical and unjust character of the provisions contained in the revised Canadian Criminal Code of 1955. It is, of course, fully appreciated that such arguments alone do not justify a change in the law which, in practice, might have the dangerous effect of exposing to greater risks the lives of police-officers and of law-abiding persons generally. The present writer is, however, impressed by the opinion of the members of the English Royal Commission on Capital Punishment who, at a time when the number of grave crimes of violence against the person and against property showed a striking increase, and when faced with precisely the same arguments which might be expected in Canada from representatives

11. For what is respectfully conceived to be the correct enunciation of this basic presumption by the Supreme Court of Canada, see *Bradley* v. *The Queen* (1956) 116 Can. C.C. 341 *per* Rand, J., at pp. 345-6, *per* Cartwright, J., at p. 365. Among the English authorities which may be referred to are: *R.* v. *Stearn* [1947] 1 K.B. at pp. 1004, 1006; *Sayce v. Coupe* [1952] 2 All E.R. at p. 717; and *Lang v. Lang* [1955] A.C. 402. A recent decision of the High Court of Australia, *Smyth v. R.* (1957) 98 C.L.R. 163, to the effect that where an accused is charged with an offence involving a specific intent, reference to the presumption is apt to be misleading and that no reference should be made to it, is, with respect, unfortunate, since the possibility of misleading a jury arises only where the presumption is regarded as being conclusive in character and not where the presumption is explained as merely stating a rebuttable inference of fact.

of the police opposing any change in the existing law,[12] expressed their firm belief that the dangerous consequences likely to result from such a change had been exaggerated.[13] Furthermore, it must be remembered that abolition of the doctrine would make no difference in the straightforward cases where death is a probable consequence of his conduct. A verdict of murder would still be returnable in such cases. The alternative course, open to the jury, is to return a verdict of manslaughter, in which event the trial judge, if the case calls for severe punishment, may exercise his discretion to the limit by imposing a sentence of life imprisonment. Were such a maximum sentence to be passed on an accused who was not shown to have intended to kill or to inflict serious bodily injury endangering life, the present writer believes that it would represent a sufficient vindication of law and order, both by way of punishment of the particular offender and as a deterrent to others bent on committing treason, piracy, prison-escape, rape, indecent assault, forcible abduction, robbery, burglary or arson, the offences presently constituting the foundation of the Canadian law of constructive murder. English law, at last convinced of the need for reform, has shown the way by taking the bold step of abolishing the doctrine altogether and it is to be hoped that Canada will likewise soon be convinced of the justice of instigating such a reform in its substantive criminal law.

J. LL. J. EDWARDS. *

12. As a pointer to this attitude, reference should be made to the *Report of the Joint Committee of the [Canadian] Senate and House of Commons on Capital Punishment* (1956, Queen's Printer, Ottawa), p. 14, paras. 52, 54, p. 15, para. 55, and to the *Minutes of Proceedings and Evidence* (1954) of the above Committee, pp. 331, 333, 335 (evidence by the President of the Chief Constables' Association of Canada).

13. *Report,* p. 41, para. 110.

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