

CONSTRUCTIVE MURDER.

prosecution of it would have been attended with personal injury to anyone; and in this respect the case differs from that in which it was decided that a smuggler firing at a revenue officer and killing himself was guilty of suicide. It has appeared to us that in the first of such cases life is sacrificed without a corresponding benefit to society by way of example. For as the offender cannot reasonably be supposed to have contemplated the crime for which he suffers, so it is scarcely to be expected that the example of his punishment will have any sensible effect in deterring others from acts which, according to common experience, are never likely to lead to the same fatal termination." With these observations few will be inclined to disagree, but very general curiosity might be felt in the inquiry how a doctrine altogether peculiar to the jurisprudence of this country, and totally incongruous with its general principles, should have come to be recognised as a clear rule of law. The explanation which has been often given, and which we venture to think is the correct one, is that it sprung from a blunder made by Sir Edward Coke in the interpretation of a passage from Bracton. The passage is as follows: "*Sed hic erit distinguendum utrum quis dederit operam rei licitæ vel illicitæ— si illicitæ, ut si lapidem proieciat quis versus locum per quem convesuerunt homines transitum facere, vel dum insequitur quis equum vel bovem et aliquis a bove vel equo percussus fuerit et hujusmodi hoc imputatur ei.*"—(Bracton, 1. 3, c. 4.) It can be seen at a glance that all Bracton intends to convey by this is that killing in the case he mentions would be unlawful; he in no way states that it would amount to murder ("murdrum"), which term indeed had quite a special and peculiar significance at the time at which he wrote, being properly confined to crimes of the nature of secret assassinations. Bracton, in fact, was too familiar with the Roman law (in which the rule on constructive murder is the exact converse of our own, Dig. 48, 8, 7) to have made such a mistake; but Coke translates and elaborates the above passage in this way: "If," he says (Inst. Part III., ch. 8, p. 56, citing Bracton in the margin), "the act (*i.e.*, the act in the

perpetration of which the killing occurs), be unlawful, it is murder. As if A., meaning to steal a deer in the Park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush, this is murder, for the act was unlawfull, although A. had no intent to hurt, nor knew not of him; but if B., the owner of the park, had shot at his own deer, and, without any ill-intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and not felony. So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium*, for it was not unlawful to shoot at the wilde fowle; but if he had shot at a cock or hen, or any tame fowle of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull."

Even if Bracton had ever stated, or meant to have stated, this as part of our law in his time, his reputation was hardly sufficient, in the face of reason and common sense, to have caused its retention in our books; for, although Coke, on one occasion, describes him as "some time a famous judge of the Court of Common Pleas" (as I find in record) "and a writer of the laws," we find that in *Stowell v. Lord Zouch* (Plowd. 357), Chief Baron Saunders cited him "not as an author in the law, for that Bracton and Glanvil were not authorities in our law, but he cited him as an ornament to discourse where he agrees with the law;" and it appears that Chief Justice Catline was of the same opinion. The fame, however, of Coke stood upon a very different footing, and there can be no doubt that it is to that over-subtle and refined lawyer that we owe the theory of constructive murder, which has been copied from the Institutes without question or comment by such old writers as Bacon, Viner, Hawkins and Foster, and in modern times by Roscoe, Russell and Brown, whilst it has often been laid down as a law to jurors from the Bench, although, we believe, that on no single occasion has a prisoner been convicted and sentenced to death for constructive murder. In one well-known and comparatively recent case indeed (*R. v. Hor-*