

## TRANSFERRED MALICE.

ciously? 2. Did the blow so struck, in fact, wound Ellen Rolston? 3. Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple? and the jury found "1. That the blow was unlawful and malicious; 2. That the blow did, in fact, wound Ellen Rolston; 3. That the striking Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected." Upon these findings a verdict of guilty was entered, and the question before the Court for the Consideration of Crown Cases Reserved was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted. The Court held that he was, and the only difficulty which they experienced in coming to that decision arose in consequence of their previous decision in the case of *Reg. v. Pembliton* (L. Rep. 2 C. C. R. 119). In that case the prisoner had been fighting with persons in a street, and threw a stone at them, which struck a window and did damage to an amount exceeding £5. He was indicted under the Malicious Injury to Property Act for "unlawfully and maliciously" causing this damage. The jury convicted him, but found that he threw the stone at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window: and the Court for the Consideration of Crown Cases Reserved held, that by this finding the jury negatived the existence of malice, either actual or constructive, and the conviction must therefore be quashed. Now, as in *Reg. v. Latimer*, the prisoner was indicted for "unlawfully and maliciously" wounding Ellen Rolston, it was naturally argued, upon the authority of *Reg. v. Pembliton*, that, as the jury had found that the striking of Ellen Rolston was purely accidental, they had here too negatived the existence of malice, either actual or constructive, and that therefore the prisoner could not be convicted. At first sight it would, no doubt, appear impossible to distinguish the two cases; but when once the learned counsel for the prisoner was obliged to admit in answer to the bench that had Ellen Rolston been killed instead of only being wounded, the prisoner would clearly have

been guilty of manslaughter, it became obvious that the case of *Reg. v. Pembliton* must in some respect be distinguishable. In the first place, the Master of the Rolls expressed his dissent with the third question which was left to the jury, as not being a material question, and pointed out that, under 24 & 25 Vict., c. 100, s. 20, under which the prisoner was indicted, the question was whether the prisoner unlawfully and maliciously wounded any other person; and although the use of the word "maliciously" rendered it necessary that the prisoner should be proved to have intended to wound, yet the section was quite general, and therefore it was not necessary to prove that the prisoner intended to wound the person actually wounded. The question for the jury therefore was, whether the prisoner, intending to wound some person, wounded a particular person. This at once led to the possibility of distinguishing the case of *Reg. v. Pembliton* from the case before the court, for in the former case the prisoner was indicted under 24 & 25 Vict., c. 97, s. 51, under which section the offence was to unlawfully and maliciously commit any damage to any property whatsoever; and it was therefore necessary, in order to convict under the section, that the prisoner should have committed damage to property intending to commit damage to some property. In *Reg. v. Pembliton* the jury having negatived the fact that the prisoner intended to commit damage to any property at all, it followed that the evidence did not support the indictment, which charged that the prisoner "maliciously did commit damage, injury and spoil upon a window." In this way the court, while they approved of the decision in *Reg. v. Pembliton*, showed that it was clearly distinguishable from the case before them, and added that, had the prisoner there been found to have intended to commit damage to property, though other than the property actually damaged, and in the execution of such intention had damaged the window actually damaged, the decision would probably have been different. For, as Mr. Justice Blackburn in that case said: "The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break