Introduction

This is an essay bringing together different contemporary reports of legal events, in order to throw light upon several questions that a focus on either set of reports alone may leave in shadow. The two sets of reports concerned are legal reports and newspaper reports. The legal event is the trial for larceny of Thomas Ashwell at the Leicester Winter Assize in 1885 and subsequent legal proceedings. The issues that are illuminated are the invisibility in newspaper reports of such issues as the bounds of legitimate judicial behavior and the desirability of legal development; and the obscuring of the importance of the individual judge’s actions in legal reports.

The Reports

Reports of legal proceedings produced for the specialist audience of legal practitioners are among the oldest printed works in Britain. Law reports were originally commercially published; in 1865 an official series of law reports was inaugurated. The official series of law reports has never displaced private market law reporting, though. The systematic publishing of reports of criminal trials for the general public dates from the early eighteenth century, with the most important eighteenth-century series of such reports, the proceedings of the Old Bailey Sessions, currently being made available on the internet.

The coverage of the local criminal justice system was a mainstay of the provincial press in the second half of the nineteenth century, regularly feeding into the national press. The local assize was a major social occasion, as well as being a legal ritual with powerful overtones of social control.
the local manifestation of the “circuit” system, under which the London-based High Court Judges toured the country to preside over trials for serious crimes. The Grand Jury and petty juries which were part of the assize ritual also provided opportunities for respectable men of sufficient wealth to take their part in dispensing criminal justice in their locality. Local (and national) newspapers would have agents at the assize (usually trained barristers), and the report of the assize was a regular feature of their coverage.

Invisible Issues and the Invisible Judge

Leicester had two local newspapers in 1885, the *Leicester Daily Mercury* and the *Leicester Journal*. Both covered the assize (including Thomas Ashwell’s trial) and generally coverage in each publication was extremely similar. Both gave prominence to the congratulatory speeches given by the presiding High Court Judge to the Grand Juries for the County and Borough. Both listed the Grand Jury memberships and then reported the presiding Judge’s speech; which commended the jurors for their attendance and the relative absence of serious crime from the lists. In 1885, for instance, the trial of a father for the negligent manslaughter of his daughter was the most prominent case reported in terms of column inches.

As the law reports of the Ashwell case show, the High Court Judges of England and Wales could not reach even a majority agreement over the case. The case opened up issues of the limits of appropriate judicial activity in criminal law, and of the very nature of larceny, the key offense against property in the substantive criminal law. Despite the local connection and extensive reporting of the original trial, these issues simply did not break the surface of the newspaper reporting. Criminal trials may have been ready copy, a source of entertainment, or even of morality tales, for the local press. However, they clearly were not seen as a source of insight into conflicts within the criminal justice system. Even when the local Recorder was unceremoniously rebuffed, for treating *R v Ashwell* as a legal authority that could be used to punish what must have been a fairly common piece of opportunistic dishonesty by a workman, the newspaper reports merely recorded the voices of the law’s oracles without question. Neither open and unresolved judicial disagreement on matters of principle, nor the slighting of local authority by London, could elicit any curiosity over of the nature of the central judiciary’s role in local newspaper reports.

Just as the local reports obscured questions about judicial lawmaking in criminal law, so law reports obscured the active judicial preparation of the
“case” of *R v Ashwell* from the raw material of Ashwell’s indictment. The trial judge, Mr. Justice Denman, reserved the case for the Court for Crown Cases Reserved (henceforth CCR). By so acting he was referring the question of law to the court that had the greatest power (bar the House of Lords), to make a declaration of the criminal law. If we are to understand the dynamics of judicial lawmaking in the Victorian criminal law we will need to examine very closely how Denman came to his decision to refer *R v Ashwell* to the CCR. To this end the newspaper accounts of the trial have been vital in recreating the events that led to the creation of the “case.”

**The Place of *R v Ashwell* in the History of Larceny**

*R v Ashwell* has been identified as the epitome of developments in the offense of larceny, and of the barren nature of the classic law of larceny. The case concerned a dispute over a sovereign, and yet saw the fourteen judges of England and Wales divided equally. Seven thought Ashwell’s conduct constituted larceny, and seven thought it did not. This judicial discord was extremely unusual. It is unique in the 273 decisions of the CCR reported in the official law reports between 1865 and 1908 and the author is aware of only one other example in the nineteenth century. The vast majority of decisions of the CCR were decided by the usual bench of five judges (250 out of the 273), and the majority of these were unanimously decided (239). The legal issues raised by *R v Ashwell* had already caused notable judicial disagreements in *R v Middleton* twelve years earlier, and would lead to the Irish Court for Crown Cases Reserved dividing five to four ten years later in *R v Hehir*.

To understand the nature of the judicial disagreement here, and thus the different conceptions of larceny and of the role for judges as lawmakers that this disagreement indicated, it is necessary to start with a conception of the nature of larceny. Larceny was a very old offense in England, dating back at least to the twelfth century. Larceny was a felony, and for most of this long history, larceny of property worth a shilling or more (grand larceny) was a capital offense. Until 1916 there was no statutory definition of larceny, just the words found in indictments, learned books, and the reported judgments of the courts. From these sources the elements of the old common-law offense of larceny can be identified. There had to be property capable of being stolen, and that property had to belong to someone other than the thief. The property must have been taken and carried away by the thief. The thief had to have taken the property against the will of the owner, and the taking had to have been in bad faith.

Probably the most influential explanation of the historical development of
larceny has been that of Fletcher, first advanced in 1976. Fletcher advanced
the thesis that there had been a shift in juristic understanding of the law of
larceny in the late eighteenth and early nineteenth centuries. He identified the
impetus for this shift in the eighteenth-century Enlightenment, which intro-
duced a subjective understanding of the nature of the offense. The triumph
of a newer subjective approach left the older approach, based on manifest
criminality, incomprehensible to jurists. Subsequent changes were largely the
working out of the consequences of the new principles of liability. For nine-
teenth- and twentieth-century jurists the old law of larceny was merely
chaotic. The rational principles that lay behind the old law were invisible to
jurists, equipped as they were with conceptual tools and preconceptions that
were incompatible with that law.

In Fletcher’s narrative, *R v Ashwell* was a part of the uncomprehending
remaking of the law of larceny by courts engaged in a major expansion of
criminal liability. Nineteenth-century courts lost sight of the rationale
behind the old law of larceny, which distinguished sharply between public
harms (amenable to criminal sanction) and private harms (amenable to civil
redress). The deprivation of property rights was not the primary organizing
principle that lay behind the old distinctions between larceny and kindred
crimes of dishonesty. The organizing principle was rather the nature of the
relationships violated, or endangered.

The Origins of the Case of *R v Ashwell*

Friday was payday for Edward Keogh, and when he left the gasworks on Fri-
day 9 January 1885 he made for the Avenue Inn, where he could warm his
body and revive his spirits. Thomas Ashwell was also in the Avenue Inn on
that night, and he called Edward into the yard. There, he asked Edward to
lend him a shilling until the next day. Edward, his wages in his pocket, agreed
and passed him a coin. Thomas always insisted that the coin he received that
night was the shilling Edward had agreed to lend him; but Edward lost a sov-
ereign that night, and became convinced that he had given it to Thomas in
the darkness of the yard.

When Edward got home that Friday night he realized his loss. That same
night, he hurried back to the pub, but the landlord, Mr. Wortley, convinced
him that he had handed over only a shilling and not a sovereign in payment
for his drink. The next morning Edward called on Thomas, and offered to
allow him to keep five shillings out of the sovereign if he would only let
Edward have the rest of it back. Thomas was infuriated by this approach and
denied having received more than the shilling he had asked for. That afternoon
Edward saw Thomas extremely drunk, and felt convinced that it was at his expense. He contacted the police and reported Thomas for stealing the sovereign.

When Police Constable Cox questioned Thomas about the events of 9 January he insisted that he had not received a sovereign from Edward. However (as related at the trial), PC Cox was lucky enough to overhear Thomas confessing to a man named Hodges, while he was crouched behind a low wall. When, like a jack-in-the-box, Cox popped up from behind the wall and confronted Thomas with his admission, Thomas was speechless. There was other evidence that cast suspicion on Thomas. Mrs. Wortley, the landlady of the Avenue Inn, remembered Thomas returning and changing a sovereign on the night of 9 January. Her report was supported by one Scotton, who had been with Thomas when he came into the public house on the second occasion. Scotton testified that Thomas had repaid him a shilling loan, with sixpence interest that night.

On 23 January 1885 Thomas was indicted and tried for larceny at the Leicester Winter Assize. Denman, the judge presiding over Crown business (criminal trials), took an interest in Thomas’s case before the trial, an interest sparked by the allegations contained in the bill of indictment, which was presented to the Grand Jury. Denman “recommended” the Grand Jury to find the bill true (so that Thomas would have to face trial) “as it was a curious case and involved a point of law which he thought should be decided.”

The judge requested a barrister, Mr. Sills, to watch the case for the prisoner and argue the case on the point of law. Thomas still denied ever having received a sovereign from Edward, and in conducting his own defense he called a witness, a young man by the name of Ludd. But Ludd did not appear, and the jury had only the unsworn word of Thomas that he had a sovereign in his pocket when he borrowed the shilling from Edward. The jury did not believe him. The judge put three questions to the jury, and upon hearing their answers, declared that they amounted to a guilty verdict. However, the judge felt that the case raised “a very nice and delicate point” of law, which he intended to reserve for consideration by the CCR in London. Therefore, he ordered that Thomas be released, bound over to appear for judgment if so called.

*R v Ashwell* came up for consideration before five judges on 21 March 1885. The judges could not agree whether the case as stated amounted to larceny. Therefore, the case was heard again on 13 June 1885, before fourteen judges. The judges were still divided, full judgments were written, and delivered on 5 December 1885. The result was seven judges in favor of the conviction standing, and seven judges in favor of quashing the conviction. This meant that the conviction stood, as there was no majority in favor of over-
turning it. Thomas was guilty of larceny because there was no majority of the judges willing to hold that he was not guilty.

Thomas was called to appear at the Winter Assize in Leicester, and he duly presented himself for sentence. The presiding judge was Justice Manisty, who had held that Thomas was not guilty of larceny at the CCR, and had consulted with Mr. Justice Denman over the appropriate sentence to award. His speech was recorded in the *Leicester Journal* on 29 January 1886:

> Considering that it was a very doubtful point, and that the temptation was put in prisoner’s way by the sovereign being handed to him instead of a shilling; considering also that the case had been hanging over him a considerable time, and must have caused him some annoyance and anxiety; considering further the great difference of opinion there was as to whether or not he had come under the criminal law—although he certainly did what was not honest, as he could easily have returned the 19s.—and considering also that he had conducted himself in a satisfactory manner, under all the circumstances of the case he thought justice might be done by binding him over in his own recognisance in £20 to appear to receive judgment when called upon.

However, Thomas had one more question to ask of the law before he disappeared from the historical record: would the conviction interfere with his pension? Justice Manisty (no doubt having no idea as to the answer to this question) fell back on the majesty of his position as the human representative of the law and replied: “You are now at liberty, and had better stand down.” Thomas understood the implied threat and left with his question unresolved.

**The Legal “Issue”**

The point of law that had attracted Denman’s attention lay in the requirement that property be taken by someone who had the necessary bad faith at the time he took it. Consider the three questions that he put to the jury at Thomas’s trial. The first question was: had Edward Keogh given Thomas Ashwell a sovereign? If the jury believed Thomas’s account then they clearly would have concluded that he had not stolen anything. The second question was: “did the prisoner, at the time he received the money, know it was a sovereign and that the prosecutor handed it to him in mistake?” The third question was: “did he discover it was a sovereign soon enough to restore it to the prosecutor without any difficulty, and did he apparently appropriate it to his own use, knowing that the prosecutor only intended to lend him a shilling?” The jury had answered:
that prosecutor handed prisoner a sovereign by mistake, but [they] had a
doubt as to whether prisoner knew what coin it was exactly at the time . . .
[and] that prisoner appropriated the money, having found what it was early
enough to have returned it without difficulty.33

On the basis of these answers there were two possible reasons why Thomas
Ashwell might not have been guilty of larceny.

First, he had not taken the sovereign from Edward Keogh. Thomas had
received the coin from Edward.34 Although Edward had not realized which
coin he was handing over, it was far from apparent that Thomas had acquired
the coin against the will of Edward. Second, even if such a receipt of a coin
was a “taking,” at law the jury had not found any bad faith at the time of the
taking, unless the act of taking could be deferred to apply to Thomas’s actions
after the physical transfer of the coin.35 Thomas seemed to have taken inno-
cently, and been in bad faith only after he discovered that he had been given
a sovereign rather than a shilling by mistake.

R v Ashwell and Judicial Lawmaking

The events of January 1885 are of special interest, beyond the inherent inter-
est that they hold for the history of social attitudes to the police, and the oper-
ation of the criminal justice system of the late nineteenth century, revealing a
complex layer of criminal conversation in which the press played a significant
role. The procedure for the reservation of a case for the CCR needs explana-
tion. There was no right for a defendant to reserve a case to the CCR, the
process was not by appeal. The decision to reserve a case for the CCR was
made by the judge. A case would only be reserved following a conviction, and
it was common practice to request a jury to give a “special verdict,” by which
was meant a jury would specify what facts it had found to be proved by
answering questions asked by the judge.36 This procedure clearly allowed a
judge to select and prepare cases for the CCR with a view to encouraging legal
development in an area of law in a particular direction.37

A role for judges as creators of law is recognized by the English legal sys-
tem, but as a secondary duty. The primary duty of judges is to resolve what-
ever dispute is brought before them, and it is generally assumed that legal
development is a by-product of the execution of this duty. The system for
referral to the CCR allowed a more active role to a judge interested in legal
development. He still needed a suitable case to be brought before him. How-
ever, given the raw material of accusation, the bill of indictment, and coopera-
tive grand and petty juries, a judge could select and refine a case for referral
to the CCR. The period 1875–1900 was largely one of legislative quiescence in the field of larceny. One possibility opened up by an examination of *R v Ashwell* is that during this legislative lull, some members of the judiciary were actively seeking to reformulate the law of larceny.

**The Historical Background**

The legal development identified by Fletcher as the metamorphosis of larceny began in the courts. In 1779 the precursor of the CCR decided, in *R v Pear*, that the hirer of a horse who had entered into a contract of hire with the intention of not returning the horse could be convicted of larceny. This type of larceny became known as “larceny by a trick.” The importance of *R v Pear* for the future of larceny was threefold. First, it marked a very considerable extension of capital criminal liability by judicial decision. Second, it created apparent anomalies in the law of larceny where the new form of liability did not extend. Third, it created a problem of demarcation between the crime of larceny and the crime of obtaining property by false pretences, a misdemeanor created by statute in 1757.

In the nineteenth century Parliament created offenses of dishonest retention of property, complementary to larceny’s prohibition of the dishonest acquisition of property. In *R v Bazeley* in 1799 it was held that an employee who received property from a third party on behalf of his employer and kept it for himself was not guilty of larceny of that property. Within months Parliament responded by the passage of a statute that made such an employee’s actions criminal as embezzlement. In *R v Walsh* in 1812 it was held that a stockbroker who absconded with bank notes, obtained by cashing a check written by his principal for the purpose of funding the purchase of stock, was not guilty of larceny. Again the legislative response was effected within months. In 1857 the legislature made the conversion of property by bailees generally criminal. These legislative changes, while respecting the integrity of the common law of larceny, made the requirement of a taking in larceny seem anomalous.

The judiciary was also active in the nineteenth century. In the seventeenth century Hale had been clear that a person who found lost property could not be liable for larceny. A finder of lost property did not take the property from the owner, because the owner had already lost possession of the property concerned. By 1848 the judges had decided that if at the time of finding property a person realized that it would be possible to trace the owner and return the property, then that person could be found guilty of larceny for a dishonest finding of lost property.
The Context of *R v Ashwell*

In 1873 the CCR decided the case of George Middleton, who had gone to the Post Office with the intention of withdrawing ten shillings from his account at the Post Office Savings Bank. To enable him to do this, George had obtained a warrant for the payment of the ten shillings. The clerk mistakenly put £8 16s. 6d. on the counter, which George picked up and kept. George was tried, and convicted, for larceny, but the presiding judge reserved the case for the CCR. There were obvious difficulties with holding that George had taken the money against the owner's will, as required for a conviction of larceny, because the clerk had deliberately given him the money. George Middleton’s case was referred by the original court of five judges to an enlarged court of fifteen judges. The conviction was upheld by a majority of eleven to four. However, of those eleven three decided the case on the ground that a Post Office clerk’s authority was limited in a peculiar manner by statute, and one took the view that George had taken the money from the clerk when he picked it up from the counter, a view not shared by any other judge. Thus only seven of the fifteen judges held that generally in such circumstances there was a “taking” for the purposes of larceny. Furthermore, the joint judgment of these seven judges indicated that it was essential that an accused acquire possession of the property allegedly stolen with the required bad faith. To quote from their joint judgment:

*We admit that the case is indistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the animus furandi.*

Denman was one of the judges who subscribed to this judgment.

As described by Fletcher, the cases of *R v Middleton* and *R v Ashwell* are the contribution of the last quarter of the nineteenth century to the metamorphosis of larceny. The joint judgment of the seven judges in *R v Middleton* did extend the law of larceny in the manner described by Fletcher. However, the dissenting judgments do not suggest a judiciary that had lost all understanding of the rationale of the old law. The vital role of *R v Pear*, and the cases that followed it, in extending the boundaries of larceny was both recognized and subjected to criticism. The key distinguishing features of the old law of larceny, as identified by Fletcher, were defended by Baron Bramwell for essentially the same reasons as those urged by Fletcher.
This defense was not the last gasp of a traditional understanding that was almost lost; four of the fifteen judges in *R v Middleton* dissented in defense of the old law, and four delivered judgments based on reasoning that did not accept the reasoning in the joint judgment.\(^{57}\) Furthermore, Bramwell's reasoning would be adopted by judges in both *R v Ashwell* and *R v Hehir*.\(^{58}\) In addition to reasoning based on the nature of larceny, three other reasons were advanced for rejecting the reasoning of the majority in *R v Middleton*. First, that the judges did not have the authority to implement such a change.\(^{59}\) Second, that the general rule of the common law was that it did not assist those that put themselves in harm's way.\(^{60}\) Third, that larceny was restrictively defined because historically the punishment for grand larceny was death, and the statutory change in the punishment did not alter the common law definition of the crime.\(^{61}\)

The Law after *R v Ashwell*

There was no majority judgment in *R v Ashwell*. Those judges who refused to affirm the conviction acted on the basis that they were following established authority. The impact of *R v Ashwell* could not be known until an opportunity arose for the questions raised by the judicial deadlock to be answered. Providentially Leicester provided such a case within weeks of the decision in *R v Ashwell* being delivered. The recorder of Leicester, reserved *R v Flowers* for the CCR in January 1886.\(^{62}\) Charles Flowers had received his wages from his employer’s clerk, and discovered they were threepence short. Charles had taken his empty wage packet to the clerk, and requested the three pennies he was owed. The clerk mistakenly handed him another man’s wage packet, which contained 7s. 11\(\frac{1}{2}\)d., and put in Charles’s hand the three pennies he had asked for. The jury found that Charles had not realized he was being given another man’s wage packet, and wages, when the clerk had handed it to him. However, upon realizing the mistake he had decided fraudulently to appropriate the money. The recorder directed that this amounted to a verdict of guilty of larceny. He relied upon *R v Ashwell*, which he held decided that an innocent receipt of property followed by a fraudulent appropriation of that property was larceny at common law. However, given the uncertain status of *R v Ashwell* he reserved the case for the CCR.

When *R v Flowers* was heard by the CCR in February 1886, this treatment of the decision in *R v Ashwell* was decisively and unanimously rejected by a court of five judges, two of whom had given or subscribed to judgments confirming Ashwell’s conviction three months previously. The CCR quashed Flowers’s conviction on the grounds that it was not larceny to receive property...
innocently and subsequently fraudulently appropriate the same. There had to be a simultaneous taking of possession with a guilty mind, and that had not happened in Charles Flower’s case. The difficulty, not touched upon by the CCR in *R v Flowers*, is to identify any relevant difference in the facts of *R v Ashwell* and *R v Flowers* which could justify treating the cases differently. In both cases the accused received an object, when it was intended that some other object should have been given to him. In both cases he accepted the object, without realizing there had been a mistake. In both cases when he subsequently realized what had happened he kept the object. In both cases the accused acted in bad faith in keeping the object. Clearly, those judges that had confirmed Thomas’s conviction but quashed Charles’s conviction did not wish to take advantage of Charles’s case to consolidate any extension of the law effected by *R v Ashwell*.

An innocent receipt due to a mutual mistake followed by a dishonest appropriation was considered once again, by the Irish Court for Crown Cases Reserved in *R v Hehir* in 1895.63 The judges were divided, and a majority held that there was no larceny in these circumstances. The case is notable for the force of statements by Mr. Justice O’Brien in support of the traditional concept of larceny, and against any aspiration to transform the law of larceny into a law forbidding dishonest appropriation:64

> It [Hehir’s behavior] remains in that category of moral transgression, as to which the law has not hitherto given effect to the views of such as think to compass the sea by undertaking the impossible task of trying to push out the confines of crime into the boundless region of dishonesty.

However, his judgment was not characteristic of the judgments in *R v Hehir*. The most important factor for the five judges in the majority was judicial reluctance to undertake a reform of the law so radical that it was more appropriately performed by the legislature.65 That *R v Ashwell* did not effect an extension of liability for larceny was confirmed, *sub silentio*, by the legislature in 1916. The Larceny Act 1916 confirmed the correctness of the joint judgment of seven judges in *R v Middleton*, but not the further extension which was necessary to confirm Ashwell’s conviction.

**Conclusion**

It has been established that the “case” of *R v Ashwell* was created by Denman, and that he must have been aware that by reserving the case he was inviting the CCR to extend larceny beyond its traditional boundaries. None of the
judges who supported the conviction even proposed that the basis of liability for larceny should be dishonesty. All suggestions that a desire to criminalize dishonest conduct \textit{per se} was at work were made by those opposing any extension of larceny’s boundaries to meet the case.\textsuperscript{66} This disinclination to ground their judgments upon the moral equities of the case may have had its origin in the castigation of such an approach to criminal liability by Baron Bramwell in \textit{R v Middleton} when he asserted: “There is more doubt in the case than has appeared to some, who seem to me to reason thus: The prisoner was as bad as a thief (which I deny), and being as bad as a thief ought to be treated as one (which I deny also).”\textsuperscript{67}

This judicial reticence in the CCR is all the more remarkable in Denman, a subscriber to the joint judgment in \textit{R v Middleton}, who was reported in the \textit{Leicester Daily Mercury} 23 January 1885 as telling the Grand Jury that the charge:

Raised a point in the criminal law which had never been decided. . . . There was no evidence so far as he could see, that Ashwell knew at the time he received the money that it was a sovereign, but his conduct afterwards was very bad. He could not find any case to meet it, but in his judgment it ought to be a criminal offence, although he thought it very doubtful that it was according to the law.

In contrast to this newspaper report, in his judgment in the CCR Denman remembered that at the trial: “if I had been compelled then and there to give a decision, I was inclined to think that the case was covered by authority.”\textsuperscript{68}

In his statement of the case to the CCR Denman attributed to the jury the opinion that “if it were competent to them consistently with these findings and with the evidence to find the prisoner guilty, they meant to do so.”\textsuperscript{69} However, there is no mention in the newspaper reports of the jury indicating any such sentiment. It is tempting, in the light of the reported address to the Grand Jury, to view the judge as foisting his own moral judgment and resulting inclination to punish onto the jury. Several judges opposed to extensions of larceny in the late nineteenth century ascribed exactly such a motive to their brethren.\textsuperscript{70} In both \textit{R v Middleton} and \textit{R v Hehir} some of the judges advocating an expansive approach to larceny accepted that such a motivation was an appropriate one for judicial decision making.\textsuperscript{71}

On the basis of a more careful consideration of \textit{R v Ashwell}, and \textit{R v Middleton}, it seems the last quarter of the nineteenth century did not evidence the loss of understanding of the old law of larceny argued for by Fletcher.\textsuperscript{72} Fletcher’s thesis is persuasive over a broad historical perspective. However, a more detailed consideration of the developments in the late nineteenth century
suggest the theory needs refining, or maybe even reformulating. In particular Fletcher has mischaracterized *R v Ashwell* as part of a linear development of ever increasing liability. A consideration of the case within its context suggests it should rather be viewed as a conversation resulting in the drawing of a line beyond which the judiciary were not willing to extend liability.

The newspaper reports never hint at any disquiet over the process of justice to which Thomas Ashwell was an unwilling party. His guilt appears to be as unproblematic an issue as the astounding good fortune of PC Cox in overhearing exactly the conversation he required to arrest and charge the uncooperative suspect. Certainly, those theories of legal change that look to moral or social panic as the motor of extensions of the criminal law receive at best negative support from *R v Ashwell.* There is no evidence of any social anxiety either being created or reflected in the newspaper reports. When the result of the CCR’s consideration was reported in the *Leicester Journal* it was headed: “A Curious Appeal Case,” and was immediately followed by a report headed: “Important Appeal Case.” The second case concerned the application of the Employers Liability Act 1880 to subcontracting miners under the “butty” system. Thus, the reporting of the case reveals moral or social aplomb, rather than moral or social panic, over Thomas’s behavior. In this instance a lack of any moral or social panic correlated with a judicial refusal to extend criminal liability.

No punishment was inflicted on Thomas Ashwell. In *R v Flowers* the CCR decisively rejected the opportunity to endorse any extension of liability suggested by the confirmation of the conviction in *R v Ashwell.* Perhaps the case should be seen as a triumph for the rule of law over a judicial urge to chasten wrongdoers. More ominous is the possibility that the case supports the view that such a judicial urge exists, and has an impact upon the development of the criminal law.

**Notes**

1. Thus, a similar technique to that used by Oldham who compares manuscript notes with published law reports in James Oldham, “Detecting Non-Fiction: Sleuthing among Manuscript Case Reports for What Was Really Said,” in *Law Reporting in Britain*, ed. C. Stebbings, 44–80 (London: Hambledon Press, 1995), but with the hope of the illumination being reciprocal.


4. Following removal of punitive taxation on newspapers in 1853 and 1869.


8. *R v Ashwell* (1885) 16 QBD 190; (1885) 16 Cox CC 1.


10. See discussion of *R v Flowers* below; *Leicester Journal*, 5 March 1886.

11. The precise force of a CCR decision within the doctrine of precedent was never adequately determined: see *R v Humphrey* [1898] 1 QBD 875 and *R v Hehir* [1895] 2 IR 709 at 756.


14. In a very small number of cases (seven), and for no apparent reason, four or six judges sat. Five cases were determined by a bench of six judges on a single day on 11 November 1865, one case was decided by a bench of six judges in 1898, and one case was decided by a bench of four judges in 1904. Therefore, between 1865 and 1908 (when the CCR was abolished) the full bench was considered necessary only on sixteen occasions.

15. (1873) LR 2 CCR 38 and [1895] 2 IR 709.

16. The distinction between grand and petty larceny was abolished and replaced by “simple larceny” in 1827: see 7 & 8 Geo. 4 c. 29 ss. 2 and 3.

17. Larceny Act 1916 s. 1.


20. Ibid., 473.

21. Ibid., 469–70. See also J. Gibson on the law of larceny in *R v Hehir* [1895] 2 IR 709 at 722.

22. Ibid., 473.

23. Ibid., 514.

24. Ibid., 473.

25. Ibid., 474.

26. *Leicester Journal*, 30 January 1885. The report continues: “His own conviction was that the case was one of larceny, because when the prosecutor parted with the sovereign, he did not mean to do so, and therefore he never had the sovereign intentionally out of his possession.”

27. *R v Ashwell* (1885) 16 QBD 190 is inaccurate in reporting the date of the trial as January 1883, the report in Cox's Criminal Law Cases at (1885) 16 Cox CC 1 gives the correct date for the trial. I have preferred the *Leicester Journal’s* report to the case as
stated by Denman J. and reported at (1885) 16 QBD 190 at 191 because the case stated makes it appear that the receipt of the sovereign was not disputed at the trial. Ashwell based his entire defense on this point. Mr. Sills argued that even if the prosecution proved its entire case there would still be no larceny.

28. The five judges were Lord Chief Justice Coleridge, Justice Grove, Justice Lopes, Justice Stephen, and Justice Cave. See R v Ashwell (1885) 16 Cox CC 1 at 3. The report in Cox gives the dates of the two hearings and the membership of the first court; the report at R v Ashwell (1885) 16 QBD 190 omits any reference to the first hearing.

29. The fourteen judges were Lord Chief Justice Coleridge, Justices Cave, Day, Denman, Field, Grove, Hawkins, Manisty, Mathew, Smith, Stephen, and Wills, and Barons Huddleston and Pollock.

30. The headnote in R v Ashwell (1885) 16 Cox CC 1 omits Justice Mathew from the list of judges in favor of quashing the conviction.


32. Leicester Journal, 30 January 1885.

33. Ibid. The ellipse is an interjection by Justice Denman: “That is just the difficulty in the case.”

34. R v Ashwell (1885) 16 QBD 190; Sills in argument at 192 and 195, Smith J. at 196, Cave J. at 200, Matthew J. at 205, Stephen J. at 206.

35. This was the effect of the reasoning of those judges who affirmed Thomas’s conviction: see ibid., Cave J. at 203–4; and Coleridge C. J. at 225.

36. The practice of judicial interrogation of juries upon the grounds of their verdict has long been discontinued. However, there is a recommendation in Lord Justice Auld, The Review of the Criminal Courts (2001), to reinstate a version of the special verdict to allow appeals from “perverse” jury verdicts; see chap. 5 para. 97; and chap. 11 paras. 43–45, recommendations 249 and 250.

37. This ability of the judiciary to reserve cases in order to allow a disputed point to be resolved was recognized and acted upon by the judiciary in an open manner: see R v Lillyman [1896] 2 QBD 167 at 168 n. 1, 173–74, 177, 178, in which Hawkins J. successfully used the reservation of a case to effect a change to the law of evidence and thereby overturned sixty years of judicial “usage” on the point.

38. Larceny Act 1861 (24 & 25 Vict. c. 96) and the Larceny Act 1916 (6 & 7 Geo. 5 c. 50) were both major pieces of legislation. However, they were both primarily consolidating statutes, concerned to restate rather than alter the law.

39. For the formation of the precursor of the CCR (which had its origin in the statute 11 & 12 Vict. c. 96) see Baker, English Legal History, 521–23.


41. For George Charlewood at least it seems the risk was not theoretical: see E. H. East, A Treatise of the Pleas of the Crown (London, 1803), reprinted in P. R. Glazebrook., ed., Blackstone’s Statutes on Common Law, 2 vols. (London: Blackstone, 1972), 689. The case is reported at R v Pear (1786) 1 Leach 409; 168 ER 306, where it is recorded “the prisoner received sentence accordingly.” However, death sentences did not necessarily lead to execution even in the eighteenth century.

42. For example, see R v Justin Harvey (1787) 1 Leach 467; 168 ER 335.

43. 30 Geo. 2, c. 24. The original statute was repealed in 1827 by 7 & 8 Geo. 4, c. 27 but reenacted in the same session of Parliament by 7 & 8 Geo. 4, c. 29, s. 53. At the
time of *R v Ashwell* the relevant statute was the Larceny Act 1861 (24 & 25 Vict., c. 96), ss. 88, 89, and 90.

44. *R v Bazeley* (1799) 2 Leach 835; 168 ER 517.

45. 39 Geo. 3 c. 85.

46. (1812) Russ. & Ry. 215; 168 ER 767.

47. 52 Geo. 3 c. 63. The offense created by this statute became the germ of the Theft Act 1968 definition of theft. See Cmnd. 2977 at para. 35. 52 Geo. 3 c. 63 was repealed and effectively reenacted in 1827 (7 & 8 Geo. 4 c. 27 and 7 & 8 Geo. 4 c. 29, ss. 49–52); which was in turn repealed in 1861 (24 & 25 Vict. 95) and replaced by s. 75 of the Larceny Act 1861 (24 & 25 Vict. c. 96); which was replaced by the provisions of the Larceny Act 1901 (1 Edw. 7 c. 10); which was replaced by s. 20(1)(iv) of the Larceny Act 1916 (6 & 7 Geo 5 c. 50).

48. 20 & 21 Vict. c. 54.


50. *R v Thurborn* (1848) 1 Den CC 387; 169 ER 293. In one isolated case the judiciary was even willing to extend larceny until it encompassed a person who was subjectively innocent at the time of a taking because the taking was tortuous; see *R v Riley* (1853) Dears. 149; 169 ER 674; which was followed in *Ruse v Read* [1949] KB 377.


52. Ibid., at 45.


55. *R v Pear* (1873) LR 2 CCR 38 at 43, 53.

56. Ibid., at 54; 56–57; 59. Fletcher, “Metamorphosis of Larceny.”

57. The joint judgment was a minority judgment. However, there were eleven judges in favor of affirming the conviction for various reasons, and the authority of the joint judgment stems from its being delivered on behalf of seven of those judges.

58. *R v Ashwell* (1885) 16 QBD 190 at 199; and *R v Hehir* [1895] 2 IR 709 at 748.

59. *R v Pear* (1873) LR 2 CCR 38 at 64; 71.

60. Ibid., at 54.

61. Ibid., at 57.


64. Ibid., at 745; 746; 747. See also Johnson J. at 745.

65. Ibid., at 738; 759; 745; 752.

66. *R v Ashwell* (1885) 16 QBD 190 at 199; 204–6; 221.


68. Ibid., at 222. Note the report in the *Leicester Journal*, 30 January 1885, quoted in footnote 25 above, which supports Denman J.’s recollection that he always inclined to holding Ashwell’s conduct larcenous.

69. *R v Ashwell* (1885) 16 QBD 190 at 191.

70. *R v Pear* (1873) LR 2 CCR 38 at 54; 56–57; 59; *R v Ashwell* (1885) 16 QBD 190 at 199; 204–206; 221; *R v Hehir* [1895] 2 IR 709 at 738; 745; 747; 751; 754.

71. *R v Pear* (1873) LR 2 CCR 38 at 42–43; 46; 49; 51; *R v Hehir* [1895] 2 IR 709 at 722; 731; 734.


Figure 3. *Illustrated Police News*, 24 May 1870. As well as depicting the interior of Westminster Police Court, the bottom three illustrations depict the early reporting of the Boulton and Park case.