CRIMINAL LAW.

CHAPTER XXVI.

HISTORY OF THE LAW RELATING TO MURDER AND MANSLAUGHTER.

HAVING in the preceding chapters given the history of offences against the tranquillity of the state, I pass to the history of offences against individuals. Most of these are punishable under the various provisions of the five consolidation acts of 1861, namely, 24 & 25 Vic. cc. 96, 97, 98, 99, and 100. These statutes define most of the crimes which they punish, and I shall have to notice both the history of the acts themselves, and the history of some of their detailed provisions; but they do not define, but assume the definitions of the most important of those crimes; particularly homicide and theft.

Each of these definitions has a history of its own, of considerable interest, quite distinct from the history of the act by the provisions of which the crime defined is punished. In the present chapter I propose to deal with the history of the definition of the offence of homicide in its two forms of murder and manslaughter. In the next chapter I shall examine, so far as I think it necessary to do so, the other provisions of the act relating to offences against the person.

The manner in which and the occasions upon which people

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may be killed, and the circumstances by which the moral character of the act of killing is determined vary little, in the times and countries with which I am concerned, and I will try to make a statement of them. The vast mass of cases which have at different times been decided about homicide have supplied the materials for this statement; but as my present object is to make the subject intelligible without dwelling on technicalities, I will not at present refer to them specifically.

The subject obviously divides itself as follows:—

1. What is homicide?

2. In what cases is homicide lawful, and in what cases is it unlawful?

3. What is the nature of the distinction between the two forms of unlawful homicide, murder and manslaughter?

It is only by this preliminary analysis of the result that the process by which it was reached can be understood.

First, then, What is homicide?

Homicide obviously means the killing of a human being by a human being; but each member of this definition suggests a further question. When does a human being begin to be regarded as such for the purposes of the definition? What kind of act amounts to a killing?

With regard to the first question the line must obviously be drawn either at the point at which the fœtus begins to live, or at the point at which it begins to have a life independent of its mother's life, or at the point when it has completely proceeded into the world from its mother's body. It is almost equally obvious that for the purposes of defining homicide the last of these three periods is the one which it is most convenient to choose. The practical importance of the distinction is that it draws the line between the offence of procuring abortion and the offences of murder or manslaughter, as the case may be. The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are also so dissimilar, that it is well to draw a line which makes it practically impossible to confound them. The line has in fact been drawn at this point by the law of

England; but one defect has resulted which certainly ought to be remedied. The specific offence of killing a child in the act of birth is not provided for, as it ought to be. It was proposed by the Criminal Code Commissioners to remove this defect[1] by making such an act a specific offence punishable with extreme severity, as it borders on murder, though the two should not be confounded.

The question what amounts to killing is of greater difficulty and intricacy and it will, I think, be found to divide itself into several subordinate questions, all having reference to the extension to be given to an expression which in its obvious primary sense presents no difficulty. Where one man with his own hand stabs, strikes, or strangles another, and so causes his death, he obviously kills him, but the exact limits of the phrase are by no means obvious. The practical questions which arise are these. Killing may be defined as causing death directly, distinctly, and not too remotely; but several questions occur as to the limitations imposed upon the word "causing" by these qualifications. The following classification of the subject is, I think, sufficient for practical purposes.

A man may be killed either by an act or by an omission. Killing by an act is the common case and shall be considered first.

In order that a man may be killed by an act the connection between the act and the death must be direct and distinct, and though not necessarily immediate it must not be too remote. These conditions are not fulfilled (1) if the nature of the connection between the act and the death is in itself obscure, or (2) if it is obscured by the action of concurrent causes, or (3) if the connection is broken by the intervention of subsequent causes, or (4) if the interval of time between the death and the act which causes it is too long. Whether in particular cases these conditions are or are not fulfilled is always a question of degree dependent upon circumstances. The principle may be illustrated in a variety of ways, but no precise and completely definite statement of it can be made.

[1] See section 212 of Draft Code.

Killing by an act which causes death in a common well recognised way either immediately or after an interval of time insufficient to disguise or complicate the connection between the cause and the effect is the typical and normal case, and this is well illustrated by the old form of indictments already described. "A. in and upon B. did make an assault, and with "a knife which he the said A. held in his right hand did give "to B. on the left breast one wound of the length of one inch "and of the depth of four inches, of which the said B. for four "days did languish, and languishing did live, and of which on "the fifth day the said B. died." The extreme particularity of such indictments shows a consciousness on the part of the early lawyers of the narrow limits of their own knowledge, and of the importance which they attached both to alleging and to proving that the unlawful act done was in fact the immediate distinct cause of the death of the deceased.

The possibility of framing an indictment for given conduct was, so long as the ancient strictness of pleading was observed, the true test of criminality, just as the question whether a given act would fall within any one of the known forms of action was regarded as the test of its being a contract or a tort.

This is illustrated by the case of witchcraft. It was for many centuries believed that people could be killed by witchcraft, but such supposed acts were never prosecuted as murder because the mode in which witchcraft operated was unknown, and so could not be stated in an indictment.

Belief in homicidal [1] witchcraft being exploded, the difficulty which it might once have caused can no longer arise, but cases may still occur in which death is caused by an act inflicting no definite assignable bodily injury upon the person killed, or in which death, if followed by such an injury, may or may not be regarded as the effect of it. Thus, for instance, it is often said, and sometimes truly, that a son breaks his mother's heart by dissolute and extravagant habits, or that a woman dies because she has been seduced and deserted.

[1] I say "Belief in homicidal witchcraft," because the belief in spirit-rapping is the modern representative of belief in witchcraft, and is as common and as earnest as its predecessor. It seems to me to be just about as well founded, and to be based upon the same fundamental absurdities.

In cases of this kind it would generally be impossible to prove any definite connection between any one act on the part of the person said to cause the death, and the actual occurrence of the death. Whether mere grief and anxiety ever killed a thoroughly healthy person, and if so, what were the special symptoms which brought the death about, is, I suppose, doubtful. I know of no instance in which the question whether such conduct is homicide has ever been raised.

Another set of cases in which it might be doubtful whether homicide had been committed or not are those in which an obscure mortal injury is definitely caused by an apparently inadequate cause—a cause at least which does not usually produce such results. A very slight nervous shock might in many cases kill a person suffering under disease of the heart as effectually as a shot or a stab. I suppose there are cases in which acts which in health would pass unnoticed, such as the disarrangement of a pillow, sudden waking from deep sleep, or the sudden communication of bad news, might cause the death of a sick person, just as a man hanging over a precipice might be killed by loosening a stone or a root. In all such cases the connection between cause and effect is not only definite, but when the facts are known it is obvious; but they are all cases in which death is caused without the infliction of any such obvious definite bodily injury as seems to have been required by the old law in order to make an act homicide. To shout in the ear of a sleeping man who has certain diseases of the heart may be as effectual a way of killing him as a stab with a knife, but at first sight such a death would not be described as being caused by any definite bodily injury. Should such a case occur in the present day I think it would be regarded as killing.

There are few, if any, decisions and not many dicta on this subject in the books. The only one of much importance with which I am acquainted occurs in [1] Hale's *Pleas of the Crown*. "If any man either by working on the fancy of "another, or possibly by harsh or unkind usage, puts another "into such passion of grief or fear that the party either dies

[1] I. 429.

"suddenly or contracts some disease whereof he dies, though "as the circumstances of the case may be, this may be "murder or manslaughter in the sight of [1] God, yet *in foro* "*humano* it cannot come under the judgment of felony, "because no external act of violence was offered, and secret "things belong to God, and hence it was that before the "statute of 1 James 1, c. 12 witchcraft or fascination was not "felony, because it wanted a trial" (I suppose this means because it could not be proved), "though some constitutions "of the civil law make it penal."

The great improvements which have taken place in medical knowledge since Hale's time of course make it possible in the present day to speak much more decisively on the question whether death has been caused by a given act or set of acts than was formerly possible. It might be impossible to say precisely whether a woman's death was caused by the unkindness of her husband, but where death was caused by a definite nervous shock or the like, I suppose there would be no difficulty in ascertaining the fact.

With regard to concurrent causes of death questions of the utmost difficulty often arise, especially upon trials for manslaughter; but the difficulty lies entirely in ascertaining the facts, and not in applying the law to them. Every effect is caused by every event of which it may be affirmed that if it had not happened the effect would not have been produced. Leaving out of consideration the remote and accidental causes of death, it often happens that several events are so connected with a given death that it is difficult to say which of them caused it.

For instance, a man in weak health is violently assaulted, and dies after some weeks or months. Upon a *post-mortem* examination it appears that he suffered under a mortal disease which no doubt was one cause of his death. The question, however, arises whether but for the violence he received he would have died when he did? The law is perfectly clear, that if by reason of the assault he died in

[1] There is something rather grotesque in the notion of God's recognizing the distinction between murder and manslaughter, as will appear when the history of the definition is given.

the spring of a disease which must have killed him, say in the summer, the assault was a cause of his death; but the difficulty of deciding the fact is often very great. I lately tried a case in which a man was accused of having caused his wife's death by a blow on the head. There was evidence that he struck her, there was also evidence that after he struck her she had jaundice and inflammation of the brain, and a premature confinement attended with some unfavourable circumstances (which, however, would tend to relieve the inflammation of the brain), after which she died. Whether the blow was the cause of this train of symptoms, or whether it was merely an accidental antecedent of them was a question of considerable intricacy and difficulty, though certain details as to the character of the inflammation of the brain showing its origin led to the prisoner's conviction.

The following are instances of concurrent causes of death. A man receives an injury for which he undergoes a surgical operation, of the results of which he dies. He refuses to undergo a surgical operation which would probably have cured him, and in consequence of his refusal he dies. The surgeon who attends him is incompetent and pursues a wrong course of treatment, either from ignorance or from bad faith, and this ends in his death. The surgeon's treatment is proper, but the patient will not observe his directions and dies. In all these cases the deceased is regarded as having been killed by the injury except in the case of the malpractice of the surgeon; but it is also worth while to observe that in all of these the connection between the act and the death caused by it is direct and distinct, though it cannot in any of them be called immediate. In each of them the man would not have died as he did if he had not been wounded; but also in each case something different from his wound caused his death, and was a more immediate cause of it than the wound.

I pass next to the cases in which, though the connection between the death and the injury is direct and distinct, other causes have intervened sufficiently distinct from and independent of the injury to prevent the case from being treated as homicide. It is needless to refer to cases where the cause

is obviously remote. No one would say, for instance, with reference to this subject, that a man's parents had caused his death by causing his birth. The only cases worth examining are those which illustrate the limit. One obvious limit is length of time. Instances of death from wounds or other injuries received many years before death are [1] not unknown. In some cases of this sort the connection is clear. In general it would be obscure. The law of England has laid down an arbitrary rule for criminal purposes upon this subject. No one is criminally responsible for a death which occurs upwards of a year and a day (that is, more than a complete year reckoning the whole of the last day of the year) after the act by which it was caused.

A more remarkable set of cases are those in which death is caused by some act which does unquestionably cause it, but does so through the intervention of the independent voluntary act of some other person. Suppose, for instance, A. tells B. of facts which operate as a motive to B. for the murder of C. It would be an abuse of language to say that A. had killed C., though no doubt he has been the remote cause of C.'s death. If A. were to counsel, procure, or command B. to kill C. he would be an accessory before the fact to the murder, but I think that if he had stopped short of this A. would be in no way responsible for C.'s death, even if he expected and hoped that the effect of what he said would be to cause B. to commit murder. In Othello's case, for instance, I am inclined to think that Iago could not have been convicted as an accessory before the fact to Desdemona's murder, but for one single remark—"Do it not with poison, "strangle her in her bed." [2]

[3] This principle would apply to the case, often discussed but never expressly decided, of murder by false testimony.

[1] It is stated, *e.g.* that Andrew Jackson received a wound in a duel which displaced some of his internal organs, and rendered him liable to occasional severe fits of sickness, one of which, many years after the duel, caused his death. Sir William Napier received a ball in his back in the Peninsular War which caused him frightful torture for the rest of his life, and might, I suppose, have caused his death.

[2] As, however, Othello killed himself, Iago, in the then state of the law, could not even have been brought to trial in England.

[3] See the case of R. *v.* McDaniel, 19 *St. Tr.* 810, note, in which this view was acted upon, though no express judicial opinion was given upon it.

Oates directly and distinctly caused the death of several innocent persons by perjury, but the fact that the judges and juries who tried the cases acted upon their own responsibility, and because they chose to believe Oates's testimony, so disconnected his perjury from the death which he caused that even in 1685 it was not thought possible to convict him of murder. An instance of a somewhat similar kind is this. A woman dies in her confinement. It can hardly be said that the father of her child has killed her, though the connection between his act and her death is perfectly distinct. Even if the connection which caused the birth of the child was a rape, I do not think that the death would amount to murder; nor would it be so if a husband, tired of his wife, and being warned that her death would be the probable result of childbirth, intending and hoping to cause her death, actually caused it in the manner supposed. Death by childbirth and the connection which leads to childbirth are separated from each other by so many possibilities, and the circumstances which render childbirth dangerous or otherwise have so little relation to its distant cause, that I think if the question were ever raised it would be considered that the cause of death was too remote for the act to be regarded as homicide. Somewhat similar illustrations might be supplied by the case of infection. A. hoping that B., his enemy, will catch the small-pox, induces him to walk down a street in which many persons are sick of it. B. catches the small-pox and dies. A. no doubt has caused B.'s death, but in a manner so remote and dependent on so many contingencies that it could hardly be said that he had killed him. Should such a case occur however, and should the facts be plainly proved, it is difficult to say how the court might ultimately decide.

Thus far I have illustrated the proposition that in the case of killing by an act the act must be connected with the death, directly, distinctly, and immediately. I now come to the case of killing by omissions.

The idea of killing by an omission implies, in the first place, the presence of an opportunity of doing the act the omission of which causes death. It would be extravagant to say that a man who having food in London omits to give

it to a person starving to death in China has killed the man in China by omitting to feed him; but it would be natural to say that a nurse who being supplied with food for a sick person under her care omits to give it, and thereby causes the sick person's death, has killed that person. Whether a person, who being able to save the life of another without inconvenience or risk refuses to do so, even in order that he may die, can be said to have killed him is a question of words, and also a question of degree. A man who caused another to be drowned by refusing to hold out his hand to save him probably would in common language be said to have killed him, and many similar cases might be put, but the limit of responsibility is soon reached. It would hardly be said that a rich man who allowed a poor man to die rather than give, say £5, which the rich man would not miss, in order to save his life, had killed him, and though it might be cowardly not to run some degree of risk for the purpose of saving the life of another, the omission to do it could hardly be described as homicide. A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child.

Whether the word "killing" is applied or not to homicides by omission is to a great extent a question of words. For legal purposes a perfectly distinct line on the subject is drawn. By the law of this country killing by omission is in no case criminal, unless the thing omitted is one which it is a legal duty to do. Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place, to ascertain the duties which tend to the preservation of life. They are as follows:—A duty in certain cases to provide the necessaries of life; a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life. Illustrations of these duties are the duty of parents or guardians, and in