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HINTS TO CRIMINAL PRACTITIONERS.

DEFENCE IN MANSLAUGHTER.

The defence of manslaughter is more difficult than the defence for murder, in this respect, that the punishment not being capital, there is less reluctance on the part of juries to convict; they are satisfied with less cogent evidence; they are more unwilling to entertain doubts; you have not the same appeal to their feelings nor to their fears. Juries will not find a verdict of guilty in murder unless the proof is conclusive; but they will convict of manslaughter on the same amount of evidence as would satisfy them in petty larceny. You must, therefore, place no reliance upon some of the most effective weapons which may be used in the defence for murder. Indeed, the greatest difficulty in the defence of manslaughter results from the variable character of the crime, which ranges from a degree less than murder, to a degree beyond excusable homicide, and the punishment from imprisonment for life to a nominal fine. Hence an acquittal is so rare that you can scarcely hope for it. Manslaughter is seldom charged without clear proof that the death was caused by the prisoner, and the question almost always is, not whether it was his act, but under what circumstances the act was done—if it was

misadventure, or excusable homicide, or if there was such mitigation as to call for very slight punishment.

In conducting a defence in manslaughter you will first see that there is evidence that the deceased died from the cause alleged, and that the prisoner was the agent by whom the death was produced. If either of these can be plausibly disputed, you will of course avail yourself of the defence thus opened, and you will find many of the arguments for a defence in murder equally applicable to this purpose. If you go for an acquittal, it must be on one or both of these grounds, or on the plea that the death was a misadventure, or excusable homicide.

If either of these be your defence, you must, as in other cases, strive to lay a foundation for it by your cross-examination, so directing it as to elicit facts from which you may draw the inference that the injury was only an accident, or that the deceased was, at the moment, acting in such a manner as to excuse the prisoner in the act that was the cause of death. But you must be prepared for very great difficulties in these defences, consequent upon the extreme jealousy with which the law regards life, making men responsible for deaths which they have occasioned inadvertently, and even where the death has not been the natural result of the injury, but of sickness, which the injury may have hastened to its close even by a day. Great discretion is demanded in the selection of the defence in manslaughter, consequent upon these difficulties, and only considerable experience makes an advocate a safe adviser upon this point.

Homicides by acts done are not so easily defended as homicides by neglect. To the legal mind mere nonfeasance conveys the same sense of wrong as misfeasance. A death caused by willful or wanton negligence is as criminal in fact as if caused by personal violence; often it is more so. But, to the minds of which juries are composed the argument is not so apparent. Neglect may be explained away; it is easy to suggest plausible excuses for it, which will be received by the jury as sufficient to justify an acquittal; and, therefore, when the charge is of manslaughter by negligence, your defence will be twofold. First, you will endeavor to show that the death was not produced by the cause alleged. For this purpose,

you will cross-examine the medical witnesses with great care, with the design to elicit from them that the symptoms from which their conclusion was drawn were consistent with causes of death other than that charged against your client. Should this fail you, the second defence is the suggestion of excuses for the conduct of the prisoner, which, if not strictly such in law, are likely to be accepted as such by a jury rightly willing to make reasonable allowances for human imperfections and infirmities. In this defence it is also important to look carefully into *the duty* which the prisoner is accused of having neglected; for it is not death produced by *any* negligence that constitutes manslaughter, but only where it is produced by a neglect to perform *a duty* which the law imposes; as upon a parent to maintain his child—a medical man to pay due attention to his patient, and such like.

If the manslaughter be by misfeasance, you will first dispute, if the facts will permit, that it was by the act of the prisoner. If that should be clearly established, you will next justify the act itself, as not being unlawful or wrongful. If that fails, your remaining defence is to reduce it to the lowest possible degree of criminality of which the case will admit. Of each of these defences in its turn.

It would be as well in all cases to remind the jury that manslaughter is *felony;* that, whatever the degree of criminality—although it does not amount to a moral wrong, however excusable in justice and reason—by the unwise and unjust harshness of our law it is a conviction for felony, with all its serious consequences. Although so slight an offence that the court will punish it with a fine of a single shilling, the prisoner leaves the dock branded as a convicted felon and, by the common law, all his property forfeited. It is marvellous that this barbarism should still be found in the common law; that some distinction is not made in the *nature* of the crime of manslaughter according to the degree of actual criminality; but so it is, unless provided by statute, and you have a right to avail yourself of it in an appeal to the jury, pointing out to them the consequences of a verdict of guilty where they are satisfied there was little or no moral guilt. In all the lesser charges, which justify such an address, you should not fail to

use it; for if there should be any doubt, it will certainly turn the scale in favor of an acquittal.[1]

You will first strive to show it not to have been the act of the prisoner. You will find it of frequent occurrence that the circumstances attending the death were so uncertain as to justify you in suggesting that the deceased was the cause of his own death, as in collisions, runnings down, and many others of the lesser phases of manslaughter. So, where the death occurred in the course of a riot, or a fray, or a fight, you will seek to show that the deceased provoked the conflict, gave the first blow, and was not struck unfairly or by any dangerous weapon. In such cases it is always difficult to prove by what hand the blow was inflicted; for in a crowd there is confusion and obstruction, insomuch that it is almost impossible for the bystander to be sure that he distinctly beheld what was passing. An extraordinary instance of this has occurred. A man was stabbed in the street by one of six men who were pursuing him. The wound was inflicted just below a gas-lamp, the light of which fell upon the victim. Two men of equal intelligence, equally clear-sighted and clear-headed, came out of a shop within seven yards of the spot. Both of them distinctly saw the hand raised and the stab given; each unhesitatingly and positively pointed out the murderer, and each indicated a different man; both of the accused were short in stature, but one had bushy whiskers, the other was closely shaven; yet both the witnesses swore that they knew the murderer by that very peculiarity. As this evidence could not be reconciled, there was an acquittal. The fact was, that the deed was done by the man who had no whiskers; but the mistake made by the other witness, whose integrity was unimpeachable, and in which he persisted to the last, although informed as to the real criminal, is potent proof, not merely of the difficulty of seeing distinctly in a crowd, but of the mistakes that the most honest spectators may fall into, if they rely too much upon the impressions made upon their senses under such circumstances.

Bearing this in mind, you will direct your cross-examination to

[1] In many of the States this argument cannot be used, because the grades of the offence are designated by statute.

the eliciting of contradictions in the witnesses. In all such cases you will test their memories, or rather how much of their story is memory and how much imagination, by a close inquiry into minute circumstances, which they are not likely to have made the subject of that most deceitful process, the passing over and over again in the memory of an incident we had witnessed, for the purpose of recalling it—a process in which the fancy is sure to play its part and to fill up whatever chasms the imperfect senses had left upon the mind at the moment. If two or more spectators are produced, and there has been no previous concert—as in a criminal case can scarcely be suspected, and certainly should not be suggested—they will probably differ upon those details in which fancy had supplied the place of memory. To test them you must make each tell the the whole story to the minutest particulars, and examine as to position, dress, lights, and the other opportunities possessed by the witness for noting the occurrences with accuracy. A rapid comparison between the narratives of the various witnesses will often enable you to detect the discrepancies which almost always appear. One will have really seen one thing, and another something else; but each *fancies* he saw that part of the transaction which the other really did see, and accordingly he gives a different account of it. Such contradictions cannot be reconciled, and you are entitled to the full advantage of them in your defence.

But there are more frequent sources of error in evidence against which it will be well to warn you here. Witnesses, having the most honest intentions and sincerely desiring to speak the truth, and the truth only, are very apt to lapse into error through the practice of talking over the subject-matter one with another. Three or four neighbors meet together, and the affair in which they are conspicuous filling their thoughts, they naturally make it the subject of their talk. Each tells what he knows and hears what the others say, and each fills up the gaps in his own memory from the memories of the others. There is no more frequent cause of false testimony than this, and if the slightest suspicion of it exists, you should make the closest inquiries from all the witnesses if ever, and how often, the story had been talked over between them, and then

it will be a topic for strong, because just, commentary to the jury.

More rarely it is open to you, upon the facts, to contend that the death was not caused by the means charged against the prisoner. In this respect the law spreads its net so very widely, that it is difficult for the most ingenious to discover an escape from it. If the death is hastened by any period, however small, it is in law homicide. The law is somewhat irrational in this. Reason would make responsibility cöextensive only with the probable consequences of an act; it would analyze the cause of the death; and if it was compounded of two causes, one pre-existing and belonging to the injured party, and the other the illegal act of the prisoner, reason would apportion both crime and punishment to the act, as it would have been under ordinary circumstances. If, for instance, a man had a severe wound, and an assailant hit him a blow which, on any other part of the body, would have been harmless, but which slightly touching the wound, increased the inflammation whereof he died; the degree of guilt, in justice and reason, is the proportion which, in producing death, the wound bore to the blow. But the law makes no such distinction, and treats the offence as manslaughter. So it is in cases where the injury is a cause still more remote; of which a case will afford an apt illustratration: A man and his wife lived in the same house with her (the wife's) father and mother. One night he returned home very tipsy, and found his wife and her mother sitting in the parlor. He threw himself upon the sofa; and being taunted by his wife for his late hours, he rose in a passion and staggered towards her, intending, as it was alleged, to give her a blow. The mother got up to protect her daughter; staggering forward in his drunkenness, the man stumbled against her, threw her down, and she fell over a stool and broke her leg. She was taken up stairs, ignorant of the nature of the injury, seated on the bedside, and not being aware that the bone was fractured, soon afterwards rose to reach something; she fell again, of course, and so increased the injury that she died in a day or two in consequence of it. The man was indicted for manslaughter *and convicted*, the judge holding that, because he caused his mother-

in-law to fall, in the course of an attempt by him to commit the illegal act of an assault upon his wife, and that fall was the foundation, though not the cause, of the inflammation that produced her death, it was manslaughter. And he was right in point of law.

Therefore you will find it almost a hopeless task to endeavor to obtain a verdict on the plea of remoteness of the death from the alleged injury. You may, if the argument fairly offers upon the facts, put it to the jury as one of your defences; but you must place no reliance upon it, and only in the last resort make it prominent, for almost any other defence is more hopeful than this. It may be a makeweight with other doubts and difficulties to incline the jury to an acquittal; but as a substantial plea it cannot be recommended. However forcibly urged by you it is sure to be destroyed by the judge, who will tell the jury that there was manslaughter in law, and that the court will award its punishment according to the actual amount of criminality.

The last defence in manslaughter is to reduce it to the lowest possible degree of crime. It has been already observed that it is an offence that varies from one degree below murder to one degree above justifiable homicide; from being a terrible crime demanding the heaviest punishment, to being no moral crime at all and deserving no punishment. Between these limits it varies infinitely, and your skill will be required, when you find acquittal hopeless, so to present it, with such circumstances of extenuation, as to induce the court to visit it with the lightest punishment. But you must bear in mind that in this defence, though you address the jury in form, you address the court in fact. Practically you plead guilty, and there is really no use in going to the jury, so far as they are concerned, save perhaps to obtain from them a recommendation to mercy. But your real purpose is to plead for mercy to the judge; you speak to his ear, and you must speak accordingly. The language and the arguments which might be well enough for a jury are not always those best adapted to win the ear or the approval of a judge, Bethink you, then, that although your eyes are upon the twelve men before you, and your voice is directed to their ears they are not your audience. Forget them, if you can, for a season.