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## SOME REMARKS UPON CHARGING THE JURY IN A TRIAL FOR MURDER.\*

Upon a trial for murder in Pennsylvania the prisoner may be convicted of murder of the first degree, the penalty for which is death, or murder of the second degree, with a maximum punishment of twenty years' imprisonment, or manslaughter, with a maximum penalty of twelve years' imprisonment. It is, therefore, obviously important for the interests, both of the prisoner and the Commonwealth, that the jury should have the law so stated to them that they can easily apply it to the facts of the case. A charge may be correct in point of law and yet so complicated as not to be intelligible to a jury. A judge might read to the jury an approved textbook upon homicide, and yet this, while a correct exposition of the law, would hardly be considered an intelligent way to instruct a jury. So a judge may take the charge of another judge which has been held to be correct and read it to the jury. The charge of Chief-Justice Agnew in the

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case of *Commonwealth v. Drum*<sup>1</sup> is published in the Supreme Court Reports. This seems to be regarded as the model of what a charge ought to be. It is an elaborate review of murder at common law, first and second degree murder under the statute, manslaughter, voluntary and involuntary, and the law of self-defence. It is no doubt admirable, but there are few, if any, cases where it is necessary to go into such a wide range of subjects. Yet the judges in Pennsylvania almost invariably deem it essential in a trial for murder to define the various degrees of homicide and consider that they have done their duty when they have given the definition in Chief-Justice Agnew's charge—some of them going so far as to read long extracts from it. Such a charge is no doubt a correct statement of the law and could not be reversed by the Supreme Court: but the judge is not charging for the Supreme Court; he is supposed to be telling the jury what the law is as applicable to the case in hand, so that they can apply it to the facts and render a just verdict.

The chief trouble arises from attempting to define murder and manslaughter, because there are no definitions of these crimes which mean anything without further explanation.

In his evidence before the Homicide Law Amendment Committee (1874) Baron Bramwell said:

"If you had to look for a definition of murder, you would not find it anywhere precisely laid down; you would have to search through Coke's Institutes, Hale's Pleas of the Crown, Hawkins's Pleas of the Crown, Leach's Crown Law, and Russell on Crimes, and a score of other books. You would not find it intelligibly or authoritatively stated anywhere to comprehend all cases; and in addition to that, when you did find it, you would find it encumbered with what I cannot help calling a number of unfortunate expressions about malice, and malice aforethought, and other things which are attended with several mischiefs."

In 1389 the Statute 13 Rich. II was passed forbidding the granting of a pardon for murder with "malice prepense." Subsequent statutes excluded from benefit of clergy "wilful prepense-

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<sup>1</sup> 58 Pa. 1.

murders," "prepensèd murder,"<sup>2</sup> "murder upon malice prepensèd,"<sup>3</sup> "wilful murder of malice prepensèd,"<sup>4</sup> "murder of malice prepensèd."<sup>5</sup> And so malice prepense or aforethought came to be the essential criterion of murder, which is, therefore, defined as the unlawful killing of another with malice aforethought, and manslaughter as the unlawful killing of another without malice aforethought. But what is malice aforethought? That is the clue to the definition. When we know what that means we know what murder is and not before. And to know what it means we must read the elaborate textbooks upon homicide, and the hundreds of reported cases in which certain facts have been held to constitute murder and certain others manslaughter. The definition is, therefore, the equivalent of saying that murder is a killing under such circumstances as the courts have adjudged to be murder, or, in other words, murder is murder.

After defining murder malice must be explained, and our judges usually do this by reading the following extract from Chief-Justice Agnew's charge, which is in its turn a quotation from Foster's *Crown Law*:

"It is not malice in its ordinary understanding alone—a particular ill-will, a spite or grudge. Malice is a legal term, implying much more. It comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured."<sup>6</sup>

Every juror probably has the popular meaning of malice in his mind and no further knowledge of its legal significance than he has acquired from this statement. It is hardly to be supposed that he could always readily determine what facts show such a wickedness of disposition, hardness of heart, or cruelty as to make the crime murder.

<sup>2</sup> 12 Hen. VII, c. 7.

<sup>3</sup> 4 Hen. VIII, c. 2.

<sup>4</sup> 23 Hen. VIII, c. 1, secs. 3 and 4.

<sup>5</sup> 1 Edw. VI, c. 12, sec. 10; Stephen's *Hist. Crim. Law of England*, vol. 3, pp. 42-44.

<sup>6</sup> Agnew, J., in *Com. v. Drum*, 58 Pa. 15.

I shall give a few instances by way of illustration:

A, for a very trifling slight, evinces a deadly hatred against B and states that he proposes to shoot him at the earliest opportunity. He meets him in the street, fires upon him and kills him, and afterwards says he is glad he did it. This, undoubtedly, would be murder, and would evince a wicked, depraved, and malignant spirit, within the definition of malice. Vary the circumstances a little: A makes the same threat, but upon meeting B in the street says that he had intended to kill him, but has left his revolver behind, that if he had it with him he would kill him. He thereupon slaps B in the face with his open hand; B falls, and, striking his head on the pavement, is killed; when A is informed of his death, he says that he is glad, that he would have shot him if he had had his weapon with him. Does not A evince the same wicked, depraved, and malignant spirit in the latter case as in the former, and if that be malice, is not A guilty of murder? But he is not, he is guilty merely of involuntary manslaughter.

A family in Canada were in the most destitute circumstances; the children were actually starving. The father, in order to save one of them from what he considered an inevitable and painful death, took the child to a bridge and dropped it into the river.

In a recent case in Philadelphia, under similar circumstances, a man, for the purpose of seeking food, left his wife and two children in a bare attic room, starving and without hope of relief. When he returned he found the door locked; upon its being broken open the mother and two children were discovered asphyxiated by gas. The woman and one child recovered, but the other died.

Would a jury be apt to conclude that this man and this woman had acted with malice, when they dearly loved their children and killed them for what they believed to be their own good? And yet in both cases the crime was murder.

I may also mention two English cases:

The prisoner cohabited with the deceased for several months previous to her death, and she was with child by him. They

were in a state of extreme distress, being unable to pay for their lodging, which they quit on the evening of the night on which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre and afterwards went to Westminster Bridge to drown themselves in the Thames. They got into a boat and from that into another boat. The water where the first boat which they entered was moored was not of sufficient depth to drown them. They talked for some time in the boat in which they at last got, he standing with his foot on the edge of the boat and she leaning on him. The prisoner then found himself in the water, but whether by actual throwing himself or by accident did not appear. He struggled and got back into the boat and then found that Eliza Anthony was gone. He endeavored to save her, but he could not get her and she was drowned.

Mr. Justice Best told the jury that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the commission of a felonious act and the survivor was guilty of murder.

The prisoner was convicted and afterwards recommended for a pardon.<sup>7</sup>

The prisoner and deceased, who passed as man and wife, engaged the back parlor of a house in Great Leonard Street, Shoreditch, for which they were to pay 3s. 6d. a week, the furniture being the landlord's. When they went there they had nothing to eat but a piece of bread and butter. They had not a change of clothes and those they had were not sufficient to cover them, and while they were there they pledged the furniture to obtain the means of subsistence. The woman was discovered lying dead on the bed. The prisoner said that they had both agreed to take poison. He was in very great distress and starving. He said, "We wished to die in each other's arms and laid down on the bed directly and we both drank it together." The judge instructed the jury that this was murder.<sup>8</sup>

You, gentlemen of the bar, may have no difficulty in saying

<sup>7</sup> *Rex. v. Dyson*, Russ. and Ry. C. C. 523.

<sup>8</sup> *Regina v. Allison*, 8 Car. and P. 418.

at once that all these prisoners were guilty of murder, but would a jury with no other knowledge upon the subject than the definition of malice as given to them, and their own popular sense of the word, not shrink from attributing hardness of heart, wickedness of disposition, and cruelty to any one of the poor unfortunates in the cases which I have cited?

To appreciate what malice means it is necessary to study the authorities. Let us examine some of these and see if it is not possible to arrive at an exact understanding of the term.

Lord Coke's treatment of the subject is characteristically disorderly, ill-arranged, and illogical. He says: "Malice prepense is when one compasseth to kill, wound, or beat another and doeth it *sedato animo*." That is express malice—a premeditated killing. If he had said that it was an intentional killing, wounding, or beating, he would have struck the key-note, and much confusion would have been avoided. Where a man kills another suddenly without any apparent motive it is murder. The law regards the intention with which an act is done and not the motive, although motive may be and often is a very important circumstance. This difficulty was felt by Coke, for he goes on to say that malice is implied in three cases:

"1. In respect of the manner of the deed, as if one kills another without any provocation on the part of him that is slain, the law implieth malice. Also the poisoning of any man implieth malice." One cannot murder another by poison without compassing to kill him *sedato animo*, and the killing of another without provocation would be a compassing—attaining, accomplishing, going about, taking a step towards—his death.

"2. In respect of the person slain, as if a magistrate or known officer, that hath lawful warrant, in doing or offering to do his office or to execute his warrant is slain, this is malice implied by the law."

"3. In respect of the person killing, as if A assault B to rob him and kills him, this is murder by implied malice, albeit he never saw or knew him before." He then states the monstrous doctrine that a killing in the doing of any unlawful act is murder.<sup>9</sup>

<sup>9</sup> Coke's Institute, pp. 51, 52, 56, 57.

To sum this up it is murder:

To kill another with premeditation.

To kill another without provocation.

To kill another by poison.

To kill a known officer while performing his duty.

To kill a man in an attempt to rob him.

To kill in the performance of any unlawful act.

Hale follows Coke. He divides malice into two kinds, malice in fact and malice in law. Malice in fact is a deliberate intention of doing some corporal harm to the person of another, and is evidenced by lying in wait, menacings antecedent, former grudges, deliberate compassing, and the like. Malice in law is to kill without provocation, to kill an officer, to kill in an attempt to rob. Having got so far as to say that malice in fact is a deliberate intention to do corporal harm, it is hard to see why he puts killing without provocation under the head of implied malice.<sup>10</sup>

In the case of *Regina v. Mowgridge*<sup>11</sup> Lord Holt said:

"Malice is a design formed of doing mischief to another, . . . he that doth a cruel act voluntarily doth it of malice pre-pensed. . . . Therefore when a man shall without any provocation stab another with a dagger or knock out his brains with a bottle, this is express malice, for he designingly and purposely did him the mischief."

This is rational and easily understood. If one does an act with an intention to kill or do great bodily harm, or which is likely to have that effect, he does it with malice, or, in other words, such an act is murder.

Foster says:

"When the law maketh use of the term 'malice aforethought,' as descriptive of the crime of murder, it is not to be understood in that narrow, restrained sense to which the modern use of the word 'malice' is apt to lead one—a principle of malev-

<sup>10</sup> Hale's Pleas of the Crown, 451.

<sup>11</sup> Kelyng, 127, 1707.

olence to particulars—for the law by the term 'malice' in this instance meaneth that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit, . . . and carry in them plain indications of a heart regardless of social duty and fatally bent upon mischief." <sup>12</sup>

Finally Sir James Fitzjames Stephen, after an examination of all the authorities, reduces the meaning of malice to one or more of the following states of mind:

"1. An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

"2. Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

"3. An intent to commit any felony whatever.

"4. An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed."<sup>13</sup>

Having learned the meaning of malice, it is easy to say what murder is. To give some illustrations of Stephen's analysis.

1. If there was an intention to kill or do great bodily harm to another, it is murder. The intention must be gathered from the circumstances of each case.

A strikes B on the head with an axe, stabs him in the heart with a knife, or shoots him in a vital spot; his act shows an intent to kill and it is murder (of the first degree under our statute).

A beats B with a moderate-sized stick, or brutally and re-

<sup>12</sup> Foster's Crown Law, 256-257.

<sup>13</sup> Stephen Dig. Crim. Law (Ed. 1904), 182.

peatedly kicks him; this shows an intention to do great bodily harm and is murder (of the second degree under our statute, unless the circumstances warrant the jury in finding an intention to kill).

A, not knowing that B has heart disease, strikes him with a light stick; this does not show an intention to kill or do great bodily harm, and is manslaughter. If it were proven that A knew B's condition and that his act would kill him, and that he intended to kill him, it would be murder.

A slaps B in the face, B falls and is killed by striking his head; this does not show an intention to kill or hurt, and is manslaughter (involuntary under our statutes).

A shoots at B, intending to kill him, and kills C; it is murder.

If it be borne in mind that the intention to kill or do great bodily harm is the criterion of murder, the cases mentioned in the first part of this paper are easily understood.

2. If there is knowledge that the act will probably cause death or grievous bodily harm, it is murder, whether death or harm was intended or not.

A, in order to rescue a prisoner, explodes a barrel of powder in a crowded street against the prison wall and kills several persons; this is murder.

A throws a heavy timber from the top of a house into a crowded street; it is murder.

A woman delivers herself of a child and leaves it in the road exposed to the cold; this would be murder or manslaughter, depending upon whether or not she knew that it would probably die.

3. It is murder to kill another in the commission of a felony, whether death was intended or not.

A, intending to rape B, seizes her and throws a shawl over her head to prevent her outcries, and B is smothered; it is murder, although it is evident that he did not intend to kill her.

A, attempting to commit burglary, enters B's house, B seizes him, and A, in order to escape, throws him to the ground and death results; this is murder, although there was no intention to

kill or do great bodily harm, nor was such the probable consequence of the act.

4. It is murder to kill an officer of justice in the lawful execution of his duty, without regard to the intention.

A, a police officer, lawfully arrests B; B, attempting to escape, strikes him with his fist. A strikes his head and is killed; this is murder. So if C, in endeavoring to rescue B, kills the officer, it is murder.

The Pennsylvania Statute of April 22, 1794,<sup>14</sup> provides that:

"All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other murder shall be deemed murder of the second degree."

If there is an intention to kill, deliberately formed and executed, it is murder of the first degree. If this be understood, it may be easily applied to the illustrations already given. If the murder is done in the perpetration or attempt to perpetrate any arson, rape, burglary, or robbery, it is murder of the first degree, whether there was an intention to kill or not.

Usually the issue in a murder trial may be reduced to one or two simple propositions. In a trial for poisoning, days and weeks may be consumed in hearing medical and other testimony, and yet the question will eventually be, Did the deceased die of poison administered by the prisoner? A man shoots another; the question will be, did he intend to kill him: it is evident that he did. The defence is that he did it in self-defence; or that he did it in the heat of passion, upon sufficient provocation. So that the Commonwealth contends for a state of facts which constitutes a crime of a certain grade, and the defence endeavors to establish another state of facts which reduces the grade of the crime or justifies an acquittal. In charging the jury is it better for the judge to tell them that if they find so and so to be the facts, the

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<sup>14</sup> 3 Sm. L. 187.

prisoner is guilty of such a crime, while if they believe the facts to be as maintained by the prisoner, he is guilty of such another crime or not guilty, as the case may be; or, to enter into a long dissertation upon homicide, defining murder at common law, explaining the meaning of malice, and many other things in no way applicable to the facts of the case?

In his examination before the Homicide Law Amendment Committee, upon being asked if he did not think the definitions in the act were confusing, Baron Bramwell said:

"I think a judge who knows his business never troubles the jury with needless definitions, but he deals with the particular case before him, and says, for instance, in the case which I have put: 'The first question that you have to consider is' (forgive a sort of model summing up) 'did the man die of the injuries which he received? The doctors prove he did. The next question is, did the prisoner commit them? as to which the evidence is so and so. Now you have to consider, if you are of opinion that he is, at least, guilty of having killed him, whether it is murder; and that depends upon the extent of the blows and the place they were directed to. If you think he intended to kill him, and did, it matters not what means he used; but suppose he did not intend it, you must consider whether the means used were likely to do it.' If you observe, in that case you lay down no definition; you assume that the jury and you both know what the law is; or you tell them what the law is in that particular case. I frankly confess that if I had to give the jury a definition, 'First of all, gentlemen, I have to tell you what homicide is, and then what criminal homicide is, and then what is not criminal homicide,' I expect the jury would be utterly bewildered. It is my duty, as a judge, to inform myself of the meaning of the act, and not to trouble the jury with a definition, except so far as necessary."

In order that you may contrast the two methods of charging a jury I will give you a few examples:

The deceased and the prisoner got into an argument on the street over some dice. The deceased approached the prisoner and offered to fight him, but made no attempt to draw any weapon, nor did he have one in his possession. They moved up

the street, the prisoner retreating and the deceased walking after him, still engaged in a wordy war, but no physical collision occurred. Finally, the deceased said, "If you think you are a better man than I am, pull off your coat and fight it out," at the same time starting to take off his coat and still advancing towards the prisoner. The prisoner immediately drew a revolver and fired two shots at the deceased, killing him almost instantly. No testimony was offered by the defence.

In his charge to the jury the judge defines murder, explains malice in the words of Chief-Justice Agnew; then informs them that murder is of two degrees, reads the statute, and accurately states that in murder of the first degree there is a specific intent to take life: that when the killing is committed in the perpetration of the enumerated felonies the law implies an intent to take life (which is a pure fiction, as the intent is immaterial).

This much of the charge covers a large page and a half of typewriting.

He then tells them that a verdict of manslaughter is possible, and defines it in the usual way as a killing without malice express or implied. He then explains the difference between voluntary and involuntary manslaughter, telling them that they have no right to convict of involuntary manslaughter, as that is not a felony, so that if they believe he committed involuntary manslaughter they should acquit him.

This covers another page and a half.

He then takes up the subject of justifiable homicide, as when the sheriff hangs in pursuance of the judgment of the court; then self-defence with illustrations.

Two pages more.

He then comes back to voluntary manslaughter and explains provocation.

The charge covers six large, closely typewritten pages and is entirely upon the law, the evidence not being reviewed.

The jury rendered a verdict of voluntary manslaughter.

It will be observed that there was no evidence whatever which could by any possibility reduce the crime to voluntary man-

slaughter; and how a shooting under such circumstances could be involuntary manslaughter is inconceivable. Nor was there any evidence at all that it was done in self-defence. The crime was murder, and if the plea had been guilty, the judge under the evidence would have been obliged to fix the grade as first degree. This charge is correct in point of law, but is it not likely that the jury failed to clearly grasp the distinctions between the various crimes and that their minds were confused by the definitions of murder and manslaughter, and that they did not appreciate the fact that malice in this case meant simply an intention to kill or do great bodily harm?

I cite this charge not as exceptional, but, on the contrary, as a type of what may be called the conventional charge in a murder trial. I could mention dozens of similar ones. Some judges, as I said before, simply read Chief-Justice Agnew's charge in the Drum case.

In another case the deceased and the prisoner got into a dispute over a game of cards. One of them, whether the prisoner or the deceased was in doubt, said "Come outside and we will fight," whereupon the deceased arose and left the room; the prisoner followed him, drawing a revolver from his pocket. Almost immediately after he had got out of the room a shot was heard. The prisoner's story was that the deceased came at him with a razor and that he fired in self-defence.

After reviewing the testimony the judge charged the jury that, as the shooting was admitted, the prisoner was guilty of murder unless he did it in self-defence. He then told them that there were two degrees of murder, and that it was their duty to fix the degree.

"Murder of the first degree is the wilful, deliberate, and premeditated killing of another. In this case how are you to determine whether it was wilful, deliberate, and premeditated. You must consider the prisoner's actions, and also the weapon which he used and the place upon the body of the deceased where he fired the weapon. Wilful, deliberate, and premeditated killing means that the prisoner formed an intention to kill and for the purpose of carrying out that intention did the act which caused the

death. If he formed an intention to kill, the murder is wilful, deliberate, and premeditated. It takes but a short time, as you know, to form an intention, and if a man has time to form an intention to kill and carries that out, it is murder of the first degree. If he did not form an intention to kill, it would be murder of the second degree."

The law of self-defence was explained.

No definitions were given, nor was the word malice used. No part of the law was referred to except such as was applicable to the facts of the case.<sup>148</sup>

The prisoner was convicted of murder of the first degree. The case was appealed to the Supreme Court and the charge attacked as not containing any definition of murder or any definition of manslaughter or any use of or definition of the word "malice." The judgment, however, was affirmed.<sup>149</sup>

In a trial for murder by poisoning the court defined common law murder, gave the full language of the statute, stated that the element of malice must be present, and gave the definition of malice which is found in *Commonwealth v. Drum*.

In another case the court charged:

"If the defendant murdered his wife by means of poison, it would be murder in the first degree, and the jury needs neither definition nor instruction in regard to any other kind of homicide. If you find that the defendant sent the poison to his wife with the intent to take her life, then the law says that is murder in the first degree, and you should say so in your verdict."<sup>150</sup>

If the evidence in the case should warrant a verdict of manslaughter, the crime need not be defined, but the judge may tell the jury that a killing in the heat of passion, aroused upon sufficient provocation, explaining what that is, will reduce an intentional killing, which would otherwise be murder, to manslaughter.

The object of this paper has been to show that the definition of murder is meaningless in itself; that malice is a technical term

<sup>148</sup> The charge is published in 14 District Reports, 663.

<sup>149</sup> *Commonwealth v. Gibson*, 211 Pa. 546.

<sup>150</sup> *McNee v. Commonwealth*, 114 Pa. 300.

which means that a killing under certain circumstances is murder, and that what these circumstances are cannot be known without a study of the authorities; and it is only after such a study that we are enabled to attain a definite and clear understanding of the term. That it is possible to so instruct a jury in a murder trial that they can have no difficulty in applying the law to the facts. I have given you the examples of two methods of charging a jury, both of which have been sustained by the Supreme Court. I leave it to you to decide which is the better of the two.