OBSERVATIONS ON THE LAWS REFERRING TO CHILD-MURDER AND CRIMINAL ABORTION, WITH SUGGESTIONS FOR THEIR AMENDMENT

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649289851

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Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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SUGGESTIONS FOR THEIR AMENDMENT.

BY

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[Reprinted from the Transactions of the MANCHESTER STATISTICAL SOCIETY.]

MANCHESTER:
DAVID KELLY, 53, MARKET STREET.
LONDON: SIMPKIN, MARSHALL, AND CO.
1864.

PRICE SIXPENCE.

MANCHESTER STATISTICAL SOCIETY.

On the Laws referring to Child-Murder and Criminal Abortion, with Suggestions for their amendment.

By Mr. George Greaves.

[Read December 9th, 1863.]

In a paper read some time since before this Society, I expressed the opinion that the great and probably increasing prevalence of Infanticide, and the cognate crimes, might, in part at least, be ascribed to the present condition of the criminal law of England in reference to such offences. I showed, by arguments, the soundness of which has not, I believe, been called in question, that the law of this country as written in the statute-book, as interpreted by the judges, and as administered in courts of justice, does not tend to deter from the commission of these crimes, but rather holds out the prospect of impunity to those tempted to commit them.

In uttering these sentiments, I should perhaps have subjected myself to the charge of wantonly endeavouring to bring the law and its ministers into contempt, had I not had a strong conviction that the alleged defects admitted of an easy remedy. I will now proceed to specify the changes which, as I believe, would bring the law into greater accordance with the principles of morality, of equity, and of science, and make it, what it is not now, "a terror to evil-doers."

It will be necessary, first, briefly to show what the law at present is. The practice of the Criminal Courts in England, in dealing with one

of the offences in question, is thus stated by Archbold, one of the best and latest authorities. In describing child-murder, he says:—"The person killed must be a reasonable creature in being, and under the king's peace. Therefore, to kill a child in its mother's womb is not murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the person who administered or gave them. So, if a mortal wound be given to a child while in the act of being born, for instance upon the head, so soon as the head appears, and before the child has breathed, it may be murder if the child is afterwards born alive, and dies thereof. But it must be proved that the entire child has actually been born into the world in a living state, and the fact of its having breathed is not a conclusive proof thereof. There must be an independent circulation in the child, before it can be accounted alive."*

In somewhat different terms, but to the same effect, the law is stated by Roscoe, an equally high authority:—"A child in the womb is considered *pars viscerum matris*, and cannot therefore be the subject of murder. * * * Whether, or not, a child was born alive is a proper question for the opinion of medical men. * * The being born must mean that the whole body is brought into the world, and it is not sufficient that the child respire in the progress of birth."†

In reference to criminal abortion, the law is thus laid down by the last quoted authority:—"A child *in ventre sa mere*" being, as we have seen, viewed as *pars viscerum matris*, "cannot be the subject of murder. At common law an attempt to destroy such a child appears to have been held to be a misdemeanour."‡ The author then gives at length the statute relating to the offence, which, as will presently be shown, entirely ignores the risk to the life of the fœtus as an element in the criminality of the act. Therefore, as a child only partially born is, by the law of England, not regarded as a living being, it is no crime wilfully to inflict upon it any amount of violent injury, provided that injury be so great as to prevent the child from

* Archbold. *Pleading and Evidence in Criminal Cases*, 14th Ed., p. 529.
† Roscoe. *Law of Evidence*, 6th Ed., p. 652. ‡ Ibid., p. 950.

being born alive. As it is notorious that children are capable, before the entire body has come into the world, of breathing, crying, and moving the limbs vigorously, it became necessary to declare a distinction between real life and legal life. In trying a case in which a child had been found with its head nearly severed from its body by an incised wound, and in which the medical evidence clearly proved that the child had respired, but failed in proving entire live-birth, a learned judge is said to have instructed the jury, that before they returned a verdict of "guilty," they must be satisfied that the child had been completely born alive; otherwise it might "medically," *i. e.* physiologically or really, be a living being, but it was not one "legally."* It would be sufficiently deplorable did the influence of such a direction from the bench extend only to the cases of children murdered during birth. But in practice it goes much further. It confers impunity on those who murder children shortly after birth. If at any assize there be in the calendar a case of alleged child-murder, the judge, in charging the grand jury, usually tells them that, before finding a true bill, they must be satisfied that the child had a separate existence, otherwise there would be no offence of which the law could take cognizance. If the case goes to trial, the counsel for the defence, after the statement by the medical witness of the facts which prove that the child was alive when the alleged violent injuries were inflicted upon it, and that its death had been caused by those injuries, asks the witness whether he can swear that the child was born alive. As must of necessity occur in an immense proportion of instances, the medical witness replies that he cannot so swear. The counsel then appeals to the judge, who at once stops the proceedings by directing a verdict of acquittal. To use the words of Dr. Taylor, than whom no man has had more experience in such cases, "if proof of entire live-birth be in all cases rigorously demanded on trials for child-murder, it is scarcely possible, when the prisoner is ably defended, that any convictions for the crime should take place." "The numerous acquittals," he adds, "that take place on trials for this crime, in face of the strongest medical

* Taylor. *Medical Jurisprudence*, 6th Ed., p. 469.

evidence, bear out the correctness of this opinion. The child is proved to have lived and breathed, but the medical evidence fails to show that the living and breathing took place, or continued, after entire delivery."*

It may be replied, that the impunity of the criminal is not necessarily complete,—that the law provides that a woman, acquitted on a charge of child-murder, may be found guilty of the offence of "concealment of birth," which is declared to be a misdemeanour punishable at the utmost with two years' imprisonment; and this verdict, where total acquittal does not take place, is the verdict usually given. The murderer of a newly born infant, if punished at all, incurs the penalty of a few months' detention in gaol; and if the birth were not concealed, there would be no legal guilt whatever, and consequently no infliction of punishment. Should a woman, after strangling or otherwise killing her infant, openly produce its body, asserting that it had died during its birth, she would, as the law now stands, entirely escape its censure.

As ordinary minds cannot understand the subtleties of the question, and can least of all appreciate the nice distinctions between "medical life" and "legal life," the impression necessarily produced on the public mind is that the life of an infant, especially if it be illegitimate, is, in the opinion of the makers and expounders of the law, of little value, and that the refinements of evidence are mere legal fictions, designed to facilitate the escape of the accused.

The influence of these impressions is visible in the assize courts. Juries are only too ready to follow the course thus indicated, and, in spite of the strongest possible evidence of the wilful murder of a child born alive, to find the prisoner guilty of the offence of concealment only, or, as in two cases tried this year (at Liverpool and at Durham), to acquit her altogether. A combination of causes, probably, leads to this lamentable miscarriage of justice. There is first the wide-spread and increasing repugnance to capital punishment under any circumstances, but which is naturally stronger in the case of women than in that of the robuster sex. Then there is

* *Op. Cit.*, p. 484.

the conviction that the law is unequal in its incidence, in visiting the erring mother alone with its inflictions, while the often more guilty male parent is suffered to go unchallenged. But, after making full allowance for these considerations, I cannot but think that, in the deplorable results in question, we behold the inevitable consequences of the unsound teaching of that authority which, to the bulk of the community, is the principal instructor in moral relations.

And then as to abortion-procuring. To those who have been taught that the fœtus in the womb is merely *pars viscerum matris*, it is only a small step further to believe that it is, at least in the earlier months of pregnancy, a mere visceral obstruction, to be, like any other such obstruction, purged away, without any breach of the moral law, provided it can be done without injury to the mother. Hence the crime of procuring abortion is daily becoming more frequent, even among married women. A writer in the number for last October of one of the leading medical periodicals of the day, *The British and Foreign Medico-Chirurgical Review*, remarking on the disapprobation, expressed by me, in my former paper, of the employment of fallen women as wet-nurses, says:—"If we become too stern with necessitous and 'fallen' mothers, abortions, still-births, and infanticide will soon augment. If we show ourselves uncompromising with the fashionable parent, 'mishaps' might possibly become more frequent in circles where they are at present only occasionally known." Comment, on such prognostications, from such a source, were needless.

We can scarcely expect to attempt, with any success, the amendment of the law as it now stands, without knowing how it has come into its present condition. To learn this it will be necessary briefly to review the legislative enactments, with reference to the crimes in question, of the principal nations of ancient and modern times. In the most ancient code with which we have any acquaintance, that, viz., of Moses, there is no special provision against the murder of infants. Neither is the crime of wilfully causing abortion forbidden, for the casualty referred to in Exodus xxi., v. 22, is that of the accidental injury of a pregnant woman, in a fray between two men, causing her miscarriage. The Jewish writer Philo was justified

in his boast, that the crimes of infanticide and abortion-procuring were not specially forbidden to his countrymen, because they were unknown among them.* It was far otherwise with the heathen people who surrounded them. In the most polished states of antiquity, not only were these crimes largely practised, but they were defended on grounds of state policy. Other nations, more immediate neighbours of the Israelites, offered their children in sacrifice, and, when the chosen people fell away into idolatry, they also made their children to pass through the fire to Moloch. Cured, by their long captivity, of their propensity to idolatry, they suffered natural affection to have its full sway, and there exists ample proof that, even after they had ceased to be the chosen people, the love of offspring existed among the Jews in a high degree.† When, therefore, all that, in Judaism, was of universal and abiding application, was adopted into the christian system of doctrine and morals, this virtue became prominent in the teaching of the early Christians, and the more so from its contrast with the principles and practices of heathenism.

The fathers of the Church strongly denounced the crimes both of infanticide and of fœticide. The eloquent Tertullian is most explicit in his condemnation of the latter offence. He says, that to prevent a child's being born alive is "murder by anticipation;" that "he is already a man who is about to become one;" that "to exterminate nascent life is as criminal as to destroy a being already born."‡ The testimony of Minucius Felix is, however, the most valuable. He was not only a christian apologist, but a rhetorician and a lawyer, and therefore knew well the full force and meaning of the terms which he employed, and the impression they would make on those whom he addressed. Now this writer speaks of the killing of the child unborn as not murder only but "*parricide.*"§ Those who are

* Milman. *History of the Jews*, 3rd Ed., vol. I. p. 171.

† It is difficult not, in thought, to connect this virtue of the Hebrews, with the chastity, in which, as Dr. Temple tells us, in his celebrated essay on "The Education of the World," they far exceeded every other nation. See *Essays and Reviews*, p. 12.

‡ Tertullian. *Apologet.* § Minucius Felix. *Octavius.*