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The Origin and Development of "Chance-Medley" in the Law of Manslaughter

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THE ORIGIN AND DEVELOPMENT OF "CHANCE-MEDLEY" IN THE LAW OF MANSLAUGHTER

It is generally agreed that the earliest situation in which an intentional homicide might be held to be manslaughter was a killing upon chance-medley [1] usually defined as a sudden affray.[2] It is the purpose of this note to examine the origins of the term and of the concept which it signified, and to trace its development in order that today's law of voluntary manslaughter may be more clearly understood.

Etymologically, the term "medley" is derived from the ancient French *meddle or melle*[3] or from barbarous Latin terms[4] signifying an "affray" as do the French terms. The word "chance" connotes suddenness and casualness.[5] The term has been written "chance-medley," as already defined, or "chaud-medley" signifying "an affray in the heat of blood."[6] Such fine distinctions, however, need not here be discussed. "Chance-medley" will be used as it is generally written and understood.

What is believed to be the earliest employment of the term of record is in the Statute of Henry VIII[7] wherein it was enacted that a person killing another who was attempting to rob or murder the killer was not subject to forfeiture of goods as was one who, "by chance-medley should happen to kill or slay any other person in his or their defence." Foster, in commenting upon the statute, styles this type of homicide "self-defence upon chance-medley,"[8] and defines it as a killing which resulted from a situation wherein one "engaged in a sudden affray quitted the combat before a mortal wound given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life."[9] Thus it is found that the use of "self-defence upon chance-medley" in this early statute is not intended as a definition of a situation which would constitute the crime of manslaughter, but is a case of homicide justifiable in self-defense. This is, however, in no way contradictory to the subsequent use of the term "chance-medley" by Coke and other writers.

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[1] 2 BURDICK, THE LAW OF CRIME (1946) sec. 458.
[2] BLACK, LAW DICTIONARY (3rd ed. 1933), FOSTER, CROWN LAW (2d ed. 1791) 276.
[3] COKE, THIRD INST. (6th ed. 1680) 57.
[4] FOSTER, *loc. cit. supra* note 2.
[5] COKE, *loc. cit. supra* note 3.
[6] FOSTER, *loc. cit. supra* note 2.
[7] 24 HEN. VIII, c. 5 (1532).
[8] FOSTER, *loc. cit. supra* note 2.
[9] *Ibid.*

Staunford, in his *Pleas of the Crown,* published in 1560, makes use of the term when he contrasts "homicide par chance medley" and "homicide perpetre per voy de murder."[10] It is in Coke's *Third Institute,* however, that we find the clearest and most often cited rationalization of the concept of homicide upon chance-medley Coke distinguishes between murder and manslaughter by citing as the differentiating factor the presence or absence of "malice forethought". "There is no difference between Murder and Manslaughter, but that the one is upon malice forethought, and the other upon a sudden occasion: and therefore is called Chance-medley."[11] A homicide upon chance-medley was declared to be felonious[12] and was defined by Coke as a killing without "malice forethought" in a "suddent brawle, shuffling, or contention."[13]

The reason for the infliction of a more lenient punishment upon one guilty of homicide upon chance-medley than upon one guilty of murder was apparently so well established and understood in Coke's time as to cause him to see no need for an explanation thereof in his work. The statutes dividing murder and manslaughter[14] recognized the differing degrees of abhorrence with which the crimes are to be viewed and established accordingly different methods of punishment. A homicide committed without "malice forethought" in a "sudden contention" was less reprehensible than a "premeditated" homicide;[15] hence the differing degrees of punishment.

It should be remembered that, at the time of Coke, "provocation" was scarcely existent in the terminology of manslaughter. The law recognized but one situation in which there might occur the crime of manslaughter,[16] that is, chance-medley, the one just described. Thus not the provoking character of an act by the deceased but the suddenness of the affray and mutuality of the conflict were the factors to be considered in determining whether an intentional killer was guilty of murder or of manslaughter.

During the period following the publication of Coke's work, the law of manslaughter underwent a change of emphasis, culminating in 1707 with *Regina* v. *Mawgridge,*[17] which case first presented a satisfactory enunciation of the doctrine of provocation. This case, citing early commentators and reviewing preceding decisions, declared that the law recognized certain situations so provoking

[10] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1923) 314, note 3.
[11] COKE, *op. cit. supra* note 3, at 55.
[12] *Ibid.*
[13] *Id.* at 57.
[14] 12 HEN. VII, c. 7 (1496), 23 HEN. VIII, c. 1 (1531), 1 EDW VI, c. 12 (1547).
[15] COKE, *loc. cit. supra* note 3.
[16] BURDICK, *loc. cit. supra* note 1.
[17] Kelyng 119, 84 Eng. Rep. R. 1108 (1707).

as to "alleviate the act of killing, so as to reduce it to be but a bare homicide."[18] These provocations were declared to be: (1) angry and sudden assaults upon one, (2) similar assaults upon one's friend who is with one at the time, (3) seeing any person abused by force and going to his rescue, (4) unlawful arrest, and (5) seeing one's wife in an act of adultery. Obviously, this doctrine more clearly defines specific situations in which a homicide might be held to be manslaughter; yet the problem remains: Did the doctrine of provocation enlarge the number of situations in which a killing constituted the lesser degree of intentional homicide?

Apparently it did. Clearly, any of the enumerated provoking situations might result in a chance-medley; yet the provocation doctrine did not, as did the doctrine of chance-medley, require that the killer and the deceased should have engaged in combat. The elements to be considered, according to this case, were the absence of "malice prepensed" and the incidence of a sufficient provocation. Thus it may be concluded that a new doctrine entered the law of manslaughter. Whether it completely replaced the original doctrine or supplemented it is a question to be considered below.

Apparently by 1707, the term "chance-medley" had, for all practical purposes, disappeared from the terminology of the criminal law. *Regina* v. *Mawgridge* made no mention of the term and later writers used the term only in historical reviews of the crime of manslaughter,[19] and to point out the erroneous confusion of the term with "homicide by misadventure."[20] From this, then, one might conclude that the doctrine of homicide upon chance-medley was replaced in, and excluded from, the law of manslaughter by the advent of the provocation doctrine. It appears, however, that only the term became obsolete and that there remained—indeed there remain today—vestiges of the ancient doctrine. The definition of manslaughter as propounded by East a century after *Regina* v. *Mawgridge* is an example: "Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter."[21] It is submitted that the foregoing definition clearly indicates the continued acceptance of the doctrine of chance-medley; for how may one differently interpret the words " or if upon sudden combat"? It appears that East has merely made a substitution of terms, but

[18] Regina v Mawgridge, Kelyng, 119, 84 Eng. Rep. R. 1108, 1114 (1707).

[19] FOSTER, *loc. cit. supra* note 2; 1 EAST, PLEAS OF THE CROWN (1806) 232.

[20] 4 BLACKSTONE, COMM. (11th ed. 1790) 184.

[21] 1 EAST, *loc. cit. supra* note 19.

that there existed in the law at that time two distinct types of situations in which a killing might be manslaughter: as a result of adequate provocation and upon a "sudden combat."

The more common definition of manslaughter today, however, makes no such distinction. Indeed, one recognized writer says: " the terms chance-medley and chaude-medley became obsolete in time, and voluntary manslaughter was defined, at common law, as the felonious and intentional killing of another, without malice aforethought, but in a sudden heat of passion caused by adequate legal provocation."[22] A leading case defines voluntary manslaughter as follows:

> "Manslaughter is the unlawful killing of another without malice; and may be voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offense. "[23]

Although the opinion subsequently quotes East's definition, *supra,* the foregoing or similar definitions are widely quoted and accepted.[24] It will be noted that this definition considers only the provocation basis.

On the other hand, at least one jurisdiction, Kentucky, has defined voluntary manslaughter as an intentional homicide in a sudden affray *or* in sudden heat of passion arising from adequate provocation.[25] Here there is to be found the same classification made by East. It is believed, however, that the division into two categories does not materially affect the requirement of adequate provocation in any given case; for more than once the Kentucky Court of Appeals has quoted with approval definitions which indicate that nothing but reasonable provocation will reduce an intentional homicide to manslaughter.[26]

Finally, the law of homicide in mutual combat will be examined. While it is doubted whether a satisfactory distinction can be made between "sudden affray" as used in the Kentucky definition, *supra,* and mutual combat, the difference in terminology renders a separate examination more practical. A good definition of mutual combat is found in a Massachusetts case: "When two meet, not intending to

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[22] 2 BURDICK, *op. cit. supra* note 1, at 184-185.

[23] Commonwealth v. Webster, 5 Cush. (Mass. 295, 304 (1850).

[24] Reeves v. State, 186 Ala. 14, 65 So. 160 (1914), State v. Elliott, 40 Del. 250, 8 Atl. 2d 873 (1939), People v Oberlin, 355 Ill. 317, 189 N.E. 333 (1934), State v. White, 138 N.C. 704, 51 S.E. 44 (1905).

[25] Beach v. Commonwealth, 240 Ky. 763, 43 S.W 2d 6 (1931), Cavanaugh v. Commonwealth, 172 Ky. 799, 190 S.W 123 (1916).

[26] Shorter v. Commonwealth, 252 Ky. 472, 67 S.W 2d 695 (1934); McHargue v Commonwealth, 231 Ky 82, 21 S.W 2d 115 (1929).

quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat."[27]

This situation may clearly be called chance-medley. In the time of Coke, had a killing occurred in such a combat, and had no proof been offered tending to show malice, the killing would have been a homicide upon chance-medley hence manslaughter. It would appear, then, that here is a situation in which the existence of provocation is not considered. A recent Georgia case thus analyzed the problem: "This grade [voluntary manslaughter] is of two types, distinguished by the motivating facts which prompt the act rather than the ends to be obtained, the one being based upon passion supposed to be irresistible and the other on the principle of mutual combat."[28]

This view, however, does not appear to be widely held, and the crime is generally defined in terms of provocation alone.[29] Despite such variance of view, it is thought that the difference in the method of approach would not materially affect the outcome in mutual combat cases. Professor Burdick has stated the rule in mutual combat cases as it would apply to those jurisdictions which require provocation as an element of voluntary manslaughter: "If two persons quarrel and forthwith engage in a fight, whether with deadly weapons or not, the blows of each are a sufficient provocation to the other, regardless of which person is in the right, or which person struck the first blow."[30]

It is believed, therefore, that despite the fact that several jurisdictions have, by definition, distinguished between homicides in sudden affray or mutual combat and those arising from adequate provocation, such a distinction is today largely theoretical and that the law of voluntary manslaughter might be simplified were the rule stated in all jurisdictions wholly in terms of provocation.

In conclusion, it is submitted that the first voluntary manslaughter cases were those homicides which occurred upon chance-medley· that the concept of "provocation" entered the law at a later date, largely supplanting the chance-medley doctrine; but that the latter remains today in the law of several jurisdictions which distinguish between situations affording provocation and situations of sudden affray or mutual combat. It is further submitted that since such a distinction rests upon historical theory and terminology and is of no practical value today the law of voluntary manslaughter might be simplified and confusion avoided by a statement of the law in terms of "provocation" alone. JOHN R. GILLESPIE

[27] *Op. cit. supra* note 23 at 308.
[28] Watson v. State, 66 Ga. App. 242, 17 S.E. 2d 559 (1941).
[29] People v Ortiz, 320 Ill. 205, 150 N.E. 708 (1926), Braunier v. State, 105 Neb. 355, 180 N.W 567 (1920).
[30] 2 BURDICK, *op. cit. supra* note 1, sec. 262e.