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HISTORICAL DEVELOPMENT OF MANSLAUGHTER

BY WILLIAM H. COLDIRON*

The purpose of this paper is to trace briefly the history of the crime of manslaughter from the time of Bracton to the present day. For convenience, the period covered will be divided into two parts, being more or less the periods into which the subject falls historically. The first period covers the three centuries between Bracton and Coke, while the second period extends from Coke to the present time. The dividing line between the two periods is drawn here because by Coke's time manslaughter, in its modern sense, had emerged as a branch of the law of homicide and from Coke's time to the present day, the history of manslaughter, as well as murder, has been concerned principally with the interpretation of "malice aforethought." The first period will deal with the work of Bracton and Coke and the various statutes that affected the crime of manslaughter with minor reference to Staundforde and Lambard. The second period will deal with the development and refinement of manslaughter as a separate branch of the law of homicide as indicated by the works of Hale, Foster and Stephen and certain minor commentators as compared with the present law of manslaughter as set out by Prof. Perkins in a recent article.3

A brief sketch of the early background of the law of homicide in England is necessary before the law as set out by Bracton can be understood. In Bracton's time, all homicide was divided into three large classes: first, justifiable homicide, which was killing in the execution of legal punishment; second, excusable homicide which was killing by misadventure or self-defense, which was felonious but subject to pardon by the king as a matter of grace; and third, all other homicides, all of which were felonious.4 Justifiable homicide played little or no part in the development of manslaughter and need not be considered further. While manslaughter in its modern sense grew almost wholly out of the third class of homicides, the second class is so closely interwoven with the early history of felonious homicide, that generally the two classes cannot be treated separately.

From a very early date all homicides were treated from a purely

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1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 314 note 3.

2 Sayre, Mens Rea (1932) 45 HARV. L. REV. 974 at 997.


4 2 POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 485; Perkins, Re-examination of Malice Aforethought (1934) 43 YALE L. J. 537 at 541.
objective point of view\textsuperscript{5} and punishment was not for the crime as we think of it today but was for revenge of the kin of the deceased. Homicide subjected the slayer to blood feud at the hands of the deceased’s kindred, but the wrong against such kindred might be remedied by a money payment to the kindred known as bot or wer, and the wrong to the king for the loss of his subject could be remedied by payment of a fine to the king known as wite.\textsuperscript{6} But even in these early times, if the slayer could show that the homicide was by misadventure or self-defense, he might remedy his wrong by payment of the wer without the wite.\textsuperscript{7} Whether the origin of these concessions to slayers by misadventure comes from the Mosaic law through the laws of Alfred, or is Germanic in origin\textsuperscript{8} does not concern us here, but it does show

\textsuperscript{5} Stephen, History of the Criminal Law of England (1883) 24-25.
\textsuperscript{6} Pollock and Maitland, op. cit. supra note 4 at 451. See also, Hale, Pleas of the Crown (Edition of 1778) 7-9 for a detailed discussion of the rates of wer which were assessed according to the rank of the slain man.
\textsuperscript{7} Hale, op. cit. 8, note (g).
\textsuperscript{8} The Jewish law of homicide is set out in Exodus XXI, 12-36.
12. He that smiteth a man, so that he die, shall be surely put to death.
13. And if a man lie not in wait, but God deliver him into his hand: then I will appoint thee a place whither he shall flee.
14. But if a man come presumptuously upon his neighbor, to slay him with guile: thou shalt take him from mine altar, that he may die.”

The places of refuge for a man who kills but not by lying in wait are provided for in Numbers XXXV 6-34.
6. Among the cities which ye shall give unto the Levites there shall be six cities of refuge, which ye shall appoint for the manslayer, that the man flee thither:
11. Then ye shall appoint you cities to be cities of refuge for you: that the slayer may flee thither, which killeth any person at unaware.
25. And the congregation shall deliver the slayer out of the hand of the revenger of blood, and the congregation shall restore him to the city of his refuge, whither he was fled: and he shall abide in it unto the death of the high priest, which was appointed with the oly oil.
26. But if the slayer at any time come without the border of the city of his refuge, whither he was fled;
27. And the revenger of blood find him without the borders of the city of his refuge, and the revenger of blood kill the slayer; he shall not be guilty of blood:
28. Because he should have remained in the city of his refuge until the death of the high priest: but after his death the slayer shall return into the land of his possession.”

Deuteronomy IV, 41-42:
“41. Then Moses severed three cities on this side of Jordan towards the sun rising:
42. That the slayer might flee thither, which should kill his neighbor unawares, and hated him not in time past: and that fleeing unto one of these cities might live.”

The quotation from Exodus given above was set out in the laws of Alfred. See 3 Stephen, op. cit. supra note 5 at 24.
Hale credits the system of wer to the northern nations. See: Hale, op. cit. supra note 6 at 7 n. (c).
that even though the early judges could not separate the physical element of homicide from the physical elements, they did recognize that there were degrees of guilt. This fact is further emphasized by the tendency to show leniency to small children who were not under all circumstances held liable for homicide.9

Toward the other extreme of the law of homicide were secret slayings, by ambush, waylaying, or secret methods. “Morth” was the word used to describe all secret crimes and was not confined to homicides alone.10 “Morth-works” would be of no particular interest here were it not for the fact that our modern word “murder” has its origin here. “Morth” in its Latinized form, “murdrum” came to be synonymous with secret killing which was always considered a heinous crime.11 This was brought about by the fact that “murdrum” was the name which designated the fine levied on the hundred if a foreigner was killed in their midst. The origin of the murdrum fine is not too well settled. One explanation of this fine is that after the Danish invasion Cnut levied such a fine on any hundred when a Dane was found dead, it being presumed that any foreigner who was found dead had been secretly killed by the English. After the Norman Conquest, William I adopted this system to protect Frenchmen from secret assaults by the English.12 The hundred might be relieved of the payment of this fine by the presentment of Englishry, that is, they could show the slain man was English, not a foreigner.13 There is some question as to whether the hundred would be relieved if the killer could be named or produced, but that need not be considered here. In certain sections of England, the hundred was assessed the “murdrum” fine even though the death was accidental but this had been at least partially abolished by Bracton’s time.14

By the latter part of the twelfth century, one who had killed by misadventure or in self-defense, was guilty of felonious homicide and was subject to appeal or indictment for the killing. But if it were shown that the killing was by per infortunium or in self-defense, it would entitle the slayer to a pardon from the king as a matter of grace.15 While a pardon from the king would save the accused’s life and

9 2 Pollock and Maitland, op. cit. supra, note 4 at 484.
10 3 Stephen, op. cit. supra note 5 at 25.
12 Hale, op. cit. supra note 6 at 447-448; I Maitland, Collected Papers (1911) 230-246; 2 Pollock and Maitland, op. cit. supra note 4 at 487, Sayre, op. cit. supra note 2 at 995, n. 75; Yntema, Lex Murdrorum (1922) 36 Harv. L. Rev. 146.
13 3 Hollesworth, op. cit. supra, note 1 at 314; 3 Stephen, op. cit. supra note 5 at 31.
14 2 Pollock and Maitland, op. cit. supra note 4 at 487.
15 2 Pollock and Maitland, op. cit. supra note 4 at 479-480.
limb, it would not prevent his goods from being forfeited, nor would it save him from suit by the relatives of the deceased for bot in payment for their loss.

With these few comments as a very general background, we turn to the work of Bracton. As has been noted, in the thirteenth century when Bracton was writing, the mental element accompanying the criminal act played little part in the determination of the guilt of the accused. But two influences were at work in the common law which were to eventually make the mental element the primary factor in determining criminal liability in homicide; these were the Roman law and the canon law. Bracton was deeply influenced by these elements and his work reflects more of the canon and Roman law than actually existed in England in his time. Bracton divided homicide into corporal and spiritual and then divided corporal homicide into four classes: (1) justifiable, in the administration of justice; (2) by misadventure; (3) by necessity; (4) by desire. While it is admitted by Bracton that one who kills by misadventure or in self-defense is guilty of felonious homicide under the common law in his time, and that the accused's only hope for mercy was a pardon by grace of the king, this did not reflect Bracton's feelings on the subject. He talks of "homicide, if it be done from malignity or through delight in shedding human blood"; of what "we must consider with the mind or with what intent a thing is done," which indicates that in Bracton's opinion the psychical element was entering the law. It is doubtful if the state of the common law justified Bracton's statements from the canonists at the time they were made, but they had such a marked influence on the later development of the law of homicide that they have proved more important than statements of the actual existing law of that time.

Between Bracton and Staundforde there was no commentator on

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16 Coke: Third Institute (6th ed. 1680) 57. There is some disagreement as to the forfeiture of goods in the case of pardon for homicide by misadventure or in self-defense. See: 2 Pollock and Maitland, op. cit. supra note 4 at 481.
17 3 Holdsworth, op. cit. supra note 1 at 312.
18 Sayre, op. cit. supra note 2 at 982-983.
19 3 Stephen, op. cit. supra note 5 at 28-29; Sayre, op. cit. supra note 2 at 985. See: 8 Seld. Soc. (1895) ix-xxxii.
20 3 Stephen, op. cit. supra note 5 at 29. Bracton also had a division of corporal homicide denoted homicide lingua the meaning of which is very obscure. Stephen points out that he does not know the meaning of this division. It is to be noted that Bracton took his analysis of homicide from Bernard of Pavia, a great canonist. See also, 2 Pollock and Maitland, op. cit. supra note 4 at 477; and Sayre, op. cit. supra note 2 at 984.
21 Sayre, op. cit. supra note 2 at 984-986.
22 Ibid.
the law of homicide, so we must turn to such sources as are available, principally the cases and the statutes, to trace the history of homicide through the fourteenth and fifteenth centuries.

Beginning in the latter part of the thirteenth century and continuing well into the sixteenth century, a series of statutes were passed which vitally affected the law of homicide. The first of these statutes to be noted was the Statute of Marlbridge in 1267 which abolished the "murdrum" fine on the hundred if the death was occasioned by misadventure. Although Bracton had pointed out that the levy of the fine in case of misadventure had fallen into disuse in certain sections of the country, this statute gave official sanction to the custom and indicates a weakening of the severity of the common law.

Close on the heels of the Statute of Marlbridge came the Statute of Gloucester in 1278 which reformed the procedure for securing pardons. This Statute required the jurors to return a verdict of misadventure or self-defense when the evidence indicated such was the case, and the justices would then report to the king, who would issue the pardon as a matter of grace. This was merely a forerunner to the later procedure by which pardons were granted as a matter of course in such cases. The wording of pardons is of particular interest in that it was here that "malice aforethought," as a legal term, came into common usage. To distinguish pardonable homicide from other homicides, the pardon would recite that the homicide was not with "malice aforethought" but was the result of misadventure or in self-defense. The exact meaning of the phrase "malice aforethought" even at this time was not definite, and it probably meant no more than intentional wrongdoing, but distinguished ordinary homicide from homicide by ambush, waylaying, and with evil intent.

At this time there were no degrees of punishment for felonious homicide. Whether the slayer killed by the most heinous method or

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23 3 Stephen, op. cit. supra note 5 at 34.
25 A misinterpretation of this statute by Coke and others led to a mistaken belief that prior to this time one who killed by misadventure or in self-defense, was hung. But this mistake has now been rectified and it is now settled that this statute merely abolished the "murdrum" fine in cases of misadventure and self-defense. Hale, op. cit. supra note 6 at 425; Foster, Crown Law (2d ed. 1791) 283-285; IV Blackstone, Commentaries (11th ed. 1760) 188. See: 7 Selb. Soc. (1895) 135-136.
27 2 Pollock and Maitland, op. cit. supra note 4 at 481, Perkins, op. cit. Supra note 4 at 540.
28 2 Pollock and Maitland, op. cit. supra note 4 at 467-169; 3 Stephen, op. cit. supra note 5 at 41.
29 3 Stephen, op. cit. supra note 5 at 38-39; Perkins, op. cit. supra note 4 at 545.
upon sudden, violent provocation, his punishment was death, usually by hanging.\textsuperscript{30} The most dastardly murderer and the slayer of one apprehended in the act of adultery with the slayer's wife were on the same footing, and each equally entitled to benefit of clergy.\textsuperscript{31}

By 1300 most of the Norman invaders had been absorbed by the English people and the presentment of Englishry had fallen into disuse. Therefore, in 1340 this fact was recognized by the statute of 14 Edw III, st. 1, C.4 which abolished the presentment of Englishry officially. With the passage of this Act the technical difference between voluntary homicide and "murder" was abolished.\textsuperscript{32} But "murdrum" continued in the law, not to indicate a technical fine, but to distinguish secret slayings by ambush, by waylaying, and by other foul means, from other types of felonious homicides. Thus, one more step in the break between murder and manslaughter was complete.

Stephen suggests that the next landmark in the course of the division between murder and manslaughter is the statute 13 Rich. II, s.2 C.1 in 1389 in which he contends that statutory recognition was given to "malice aforethought" for the first time.\textsuperscript{33} Even though this contention is correct, it is unimportant because it has been overlooked or ignored by most of the writers whose work have had the greatest influence in the law of homicide.\textsuperscript{34}

There seems to have been a lull in the development of the law of homicide during most of the fifteenth century. The law had progressed little since Bracton. All persons accused of felonious homicide were still treated equally so far as punishment and benefit of clergy were concerned. Pardons in the cases of misadventure and self-defense by the end of the fifteenth century had probably become a matter of course rather than a matter of grace with the king, but pardons were still necessary.\textsuperscript{35} Even though a pardon would save the life and limb of a slayer by misadventure or in self-defense, his goods were still forfeited.\textsuperscript{36} The practice of forfeiture of goods in the case of excusable homicide was not abolished until the statute of 9 Geo. IV C.31, sec. 10, in 1828, although it had fallen into disuse before that time.\textsuperscript{37}

\textsuperscript{30} Perkins, op. cit. supra note 4 at 541-543.
\textsuperscript{31} Ibid.
\textsuperscript{32} 3 Stephen, op. cit. supra note 5 at 40.
\textsuperscript{34} 3 Stephen, op cit. supra note 5 at 43.
\textsuperscript{35} 2 Pollock and Maitland, op. cit. supra note 4 at 481.
\textsuperscript{36} Ibid.
\textsuperscript{37} 2 Pollock and Maitland, op. cit. supra note 4 at 481, n. 3.
At the end of the fifteenth and in the first half of the sixteenth century came a rapid and definite break between murder and manslaughter. This break was effected by the enactment of four statutes which ousted the benefit of clergy in the case of homicide with "malice aforethought." These statutes, 12 Hen. VII, C.7 (1496); 4 Hen. VIII C.2 (1512); 23 Hen. VIII C.1, sec. 3, 4 (1581); and 1 Edw VI C.12, sec. 10 (1547) provided that offenses which were described as "murder upon malice prepensed," "murder of malice prepensed," "wilful prepensed murders," and "prepenselyd murders" were excluded from the benefit of clergy, thus making a definite distinction between ordinary culpable homicide and the more aggravated type described as "murder" or "murder of malice prepensed." The word "manslaughter" as the word descriptive of culpable homicide less than murder or homicides not aggravated by ambush, lying in wait, or malice prepensed had not yet made its appearance in the law. These statutes are generally conceded to mark the break in the law of homicide which created the two divisions of murder and manslaughter, but it could hardly be said that the various refinements which enter into present-day distinction were complete at this time. To bring forth the distinction as it exists in its modern sense required the work of three great writers, Staunforde, Lambard, and Coke, whose work followed soon after the enactment of these statutes.

Prior to Staunforde, there had never been a treatise of any note dealing solely with criminal law and his *Pleas of the Crown*, published in 1560 was hardly more than a repetition of Bracton. Staunforde should be noted particularly because he divided or contrasted "homicide par chance medley" and "homicide par voy de murder." In the phrase "chance medley" lie the roots of the present-day elements of "sudden heat and passion" and provocation which were later to distinguish manslaughter from murder and which are a blight on the law of manslaughter similar to the even more am-

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86 Perkins, *op. cit. supra* note 4 at 543-544.
88 Report of New York Law Revision Commission for 1937 at 536-537 states: "The result (of these statutes) was a division of culpable homicides into two groups; murder punishable by death and comprised of homicides committed by lying in wait, assault, or malice prepensed, and all other homicides, later termed manslaughter, punishable as to those who claim benefit of clergy by a slight burn of the hand and short imprisonment." See also: 3 Stephen, *op. cit. supra* note 5 at 44-45; Perkins, *op. cit. supra* note 4 at 543-544.
89 3 Stephen, *op. cit. supra* note 5 at 46.
90 3 Holdsworth, *op. cit. supra* note 1 at 314 n. 3 states that Staunforde's book was published in 1560, but Sayre, *op. cit. supra* note 4 at 992 n. 60 gives the date as 1557.
biguous phrase “malice aforethought” in the law of murder. It is interesting to note that Staundforde thought that the meaning of “malice prepensed” was so well settled as not to require an explanation.44

In 1604, the famous Stabbing Statute45 which was to cause much comment by later writers46 was enacted. Treatment of this statute by the courts is most interesting. Parliament, by this statute, attempted to throw the law of homicide back to its old severity by making a certain set of circumstances a conclusive presumption of “malice aforethought.” The courts refused to allow the trend of the law to be reversed, and by strict construction of the statute deprived it of its severity. It is generally agreed that this statute was an attempt to make a crime of murder, with malice prepensed, out of circumstances which might only justify a conviction of “chance medley.” This was an important distinction at this time because murder with malice prepensed had been ousted of the benefit of clergy by the above-mentioned statutes and thus a conviction for that crime meant death. But “chance medley” or other homicides were clergyable and called only for a branding on the brawn of the thumb and imprisonment for the maximum of one year.47

Lambard was the next writer, and his work is of interest here only in that he states that former malice will be imputed to one who kills “suddenly without any outward show of present quarrel or offense.”48 This would indicate that killing during a present quarrel would not be malicious but only chance medley. Thus, sudden quarrel is emerging as sufficient provocation to reduce what otherwise would be murder with malice aforethought to chance medley or manslaughter. Stated in another way, homicide provoked by sudden quarrel was not aggra-

44 Foster thought that Staundforde was the clearest and best writer of Crown Law before Hale. Foster, op. cit. supra note 25 at 303. This is interesting because Coke has had far greater influence in the law than the comparatively unknown Staundforde. 3 Stephen, op. cit. supra note 5 at 54 credits much of Coke’s influence to the fact that he wrote with an air of authority.
45 1 Jac. I, c.8. The statute provided that anyone who stabbed another “on the sudden” when the person stabbed had not drawn a weapon or had not struck a blow, and the person stabbed died in six months after the stabbing, “although it cannot be proved that the same was done of Malice forethought shall suffer Death as in the case of wilful Murder.”
The statute was occasioned by the fact that frequent stabbings occurred between the Scotch and the English at the accession of James I. IV Blackstone, op. cit. supra note 25 at 193.
46 Foster, op. cit. supra note 25 at 297-302; Hale, op. cit. supra note 6 at 467-170.
47 3 Stephen, op. cit. supra note 5 at 46; Perkins, op. cit. supra note 4 at 544, Sayre, op. cit. supra note 2 at 996-997.
48 3 Stephen, op. cit. supra note 5 at 50.
vated by circumstances sufficient to raise simple culpable homicide to the non-clergyable offense of murder with malice aforethought.

Coke's *Third Institute*, published in 1628, marks the end of our first period. At this time, the word "manslaughter" had entered the law to designate a division of the law of homicide. In distinguishing between murder and manslaughter, Coke said:

"Some manslaughters be voluntary, and not of malice forethought, upon sudden falling out. And this for distinction sake is called manslaughter. There is no difference between murder and manslaughter, but the one is upon malice forethought, and the other upon a sudden occasion: and therefore is called chance-medley."

In giving a definition of chance medley, he states;

"Nota, Homicide is called chancemedley, or chancemelle, for that it is done by chance (without premeditation) upon a sudden brawle, shuffling, or contention: for medle or melle (as some say) is an ancient French word, and signifieth brawle, or contention. So as killing of a man by chance-medley, is killing of a man upon sudden brawle or contention by chance."

Thus, it would seem in Coke's time that manslaughter was limited to killing upon sudden quarrel or falling out. Coke cited the following example:

"As if two meet together, and striving for the wall the one kill the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion gone into the fields and fought, and the one had killed the other; this (as hath been said) had been but manslaughter, and no murder; because all that followed, was but a continuance of the first sudden occasion, and the heat of blood kindled by ire was never cooled, till blow was given."

Here, for the first time in the writer's search, is cooling-time mentioned. This element is to play an important part in the future development of manslaughter and it is to be noted that Coke gave no definition of cooling time, nor did he attempt a test for it. It is difficult to say whether cooling time was an established element of manslaughter before Coke's time or whether it was an innovation with him. As pointed out by Stephen, Coke speaks with an air of authority, but many of his statements must be accepted with caution.

In giving his three examples of implied malice, Coke lists as the first case, "As if one killeth another without any provocation of the part of him that is slain, the law implieth malice."

But Coke...
does not give a definition or examples of extent of provocation. Shepen suggests that provocation was limited to affrays involving the use of weapons carried by all men in those days or at least Coke's writings seem to be confined to such cases.  

Thus we see that by the middle of the seventeenth century, manslaughter had emerged as a separate branch of the law of homicide. At this time manslaughter was the killing of one upon sudden provocation, provocation apparently limited to sudden affray or chance medley, before there had been sufficient time for the blood to cool. It was a clergyable felony for which the prescribed punishment was the branding of the letter “M” on the thumb and imprisonment for one year.

In discussing the second period no attempt will be made to trace the history of manslaughter, as a branch of the law of homicide, as has been done in the first period, but we will take the major elements of the law of manslaughter separately and attempt to show the writers on criminal law during the period. Hale, Foster, Stephen, and Perkins have been selected as the principal authors although the writer is not unmindful of Hawkyn, East, Bishop, Wharton and others who have been influential in the field of criminal law. A brief discussion of the analysis of manslaughter by each of these commentators is necessary in order to appreciate the nature of the comparisons here attempted.

Hale demonstrated, unconsciously, that manslaughter is a catch all term which is used to label all homicides which are not murder, but which are not excusable or justifiable. One chapter is entitled Of homicide, and its several kinds, and first of these considerations that are applicable, as well to murder as manslaughter, and another is called “Of Manslaughter,” but even here he could not separate manslaughter from another element, the Stabbing Statute. Elsewhere Hale deals with manslaughter in connection with other subjects such as accessories, involuntary homicide and per infortunum, kill-

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54 3 Stephen, op. cit. supra note 5 at 59.
56 Hale, op. cit. supra note 6.
57 Foster, op. cit. supra note 25.
58 Stephen, Digest of the Criminal Law (1877).
59 Perkins, op. cit. supra note 3.
60 Hale, op. cit. supra note 6 at 424.
61 Hale, op. cit. supra note 6 at 466.
62 Hale, op. cit. supra note 6 at 435.
63 Hale, op. cit. supra note 6 at 471.
gestures alone, however apporbrious, have never constituted provocating by necessity and in self-defense, and forfeiture. The law as it existed in his day must be gleaned from the various cases in which he differentiates between manslaughter and self-defense, manslaughter and murder, manslaughter and per infortunum, and like comparisons.

Foster has a separate chapter on manslaughter in which he divides provocation into five sections. But Foster closely follows Hale and much of the law of manslaughter will be found in the chapters dealing with murder and misadventure. Foster repeats many of Hale’s cases, but adds several of his own.

Stephen does not attempt a critical analysis of manslaughter similar to that he made of murder. He deals with manslaughter principally in distinguishing it from murder, but he does set out several examples of provocation by way of definition of that term. Stephen comments briefly on Coke, Hale, and Foster and gives credit to East and Russell for their collection of cases on the subject. On the whole Stephen’s work on manslaughter seems to be little more than a condensation or annotation of Russell’s collection of cases and very unsatisfactory when compared to his analysis of murder.

Perkins in his article attempts a more or less detailed analysis of the law of manslaughter and his citations are to modern cases rather than a mere repetition of the worn examples of Coke and Hale. The more detailed analysis is a substitute for the mass of cases given by the earlier writers, but there is a striking similarity between much of the language used by Hale and that used by Perkins.

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64 HALE, op. cit. supra note 6 at 478.
65 HALE, op. cit. supra note 6 at 492.
66 FOSTER, op. cit. supra note 25 at 290-297.
67 FOSTER, op. cit. supra note 25 at 307.
68 FOSTER, op. cit. supra note 25 at 258.
69 STEPHEN, op. cit. supra note 58 at 161, 380-391.
70 STEPHEN, op. cit. supra note 58 at 164-168.
71 The majority of the cases from which Stephen takes his rules may be found in Hale or Foster and actually add little to what had already been said by these writers.
72 STEPHEN, op. cit. supra note 58 at 383.
73 by showing that my definition of murder and manslaughter respectively, will be found, upon examination, to be equivalent to what is stated in Coke’s 3d Institute, Chapters VII and VIII, 1 Hale’s Pleas of the Crown, pp. 411-502 (Chapters XXXI-XLII, both inclusive), and Foster’s Discourse on Homicide (Crown Law, 255-337). The existing law on the subject is found mainly on these words, and the almost innumerable decisions bearing upon the subject are all applications of the theory which is there laid down.”
74 STEPHEN, op. cit. supra note 5 at 79.
75 Stephen seems to admit as much when he stated, “I have reduced the law upon the subject homicide to the form of propositions which will be found in my Digest, in which also will be found an account of the vast mass of cases collected in Russell on Crimes, showing how all of them find their place under the various propositions into which I have condensed the law.”
76 Perkins, op. cit. supra note 3 at 410-433.
No attempt will be made to trace the development of manslaughter into the voluntary and involuntary classifications at this point other than to note that during Coke's time all manslaughter was voluntary because it included only one category, that of homicide initiated by chance medley or sudden affray which involved a voluntary slaying. By Hale's time there was a distinction between voluntary and involuntary manslaughter and this distinction will be separately considered.

Perkins says, "An intentional homicide in a sudden rage of passion engendered by adequate provocation, and not the result of malice conceived before the provocation, is voluntary manslaughter." The controlling element in the present day law of manslaughter thus appears to be "adequate provocation," so let us turn back the clock to the time of Hale and see how the present day rule of provocation was evolved.

Hale does not state how great the provocation must be in order to mitigate homicide, otherwise murder, to manslaughter. He merely states that manslaughter is homicide not aggravated by malice, express or implied, and then proceeds to give cases wherein manslaughter may be distinguished from murder. But Foster recognizes that there must be sufficient provocation to cause a man to act from passion rather than reason. His statement that "The indulgence shown to the first transport of passion in these cases is plainly a condescension to the frailty of the human frame, to the furor brevis, which, while the frenzy lasteth, rendereth the man deaf to the voice of reason," is the classic statement of the effect of adequate provocation. Perkins merely paraphrases, more or less, Foster's statement and states that the heat of passion aroused by the provocation need not be so great that the slayer did not know what he was doing, but "that for the moment his action is being directed by passion rather than by

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74 HALE, op. cit. supra note 6 at 466.
"Manslaughter, or simple homicide, is the voluntary killing without malice express or implied, and differs not in substance of the fact from murder, but only differs in these ensuing circumstances."

HALE, op. cit. supra note 6 at 471.
"Involuntary homicide is the death or hurt of the person of a man against or besides the will of him that kills him.
And in these cases, to speak once for all, the indictment itself must find the matter, or in case the indictment be of murder or manslaughter, and upon the trial it appears to the jury it was involuntary the jury ought to find the special matter,"

75 Perkins, op. cit. supra note 3 at 412.

76 HALE, op. cit. supra note 6 at 466.

77 FOSTER, op. cit. supra note 25 at 296.

78 Id. at 315.

79 1 RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS (7th American ed., from the 3d London ed. 1853) 516, repeats the statement verbatim. See also, III BLACKSTONE, op. cit. supra note 25 at 191; 1 EAST, PLEAS OF THE CROWN (1806) 292.
Thus it seems that the adequacy of the provocation necessary to reduce murder to manslaughter has not changed since the time of Foster. Whether the adequacy of provocation was to be measured by an objective or subjective test did not seem to concern the early writers, but the language of the numerous cases cited by them would justify Perkin's statement that the test is objective.

From the time of Coke it has been necessary that the provocation rises suddenly so as to refute any idea that the homicide was the result of any preconceived malice. The best discussions of this problem come in consideration of accessories before the fact by the earlier writers. Foster's statement as to suddenness of the provocation is a good statement of the law as it existed then and today. "The provocation therefore which extenuateth in the case of homicide must be something which the man is conscious of, which he feeleth and re-senteth at the instant the fact which he would extenuate is committed, not what time or accident may afterwards bring to light."

Closely connected with the problem of the suddenness of the provocation is the problem of "cooling time." As has been indicated, Coke made the first reference to cooling time to be found by the writer. Coke's example of sudden affray and the statement of the lack of cooling time was repeated by Hale, who added Royley's Case as another example of test of cooling time. These two cases have been the standard illustrations from Hale to Stephen when the problem of cooling time was being considered. As in the case of

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80 Perkins, op. cit. supra note 3 at 423.
82 Perkins, op. cit. supra note 3 at 423.
83 Coke, op. cit. supra note 16 at 55.
84 "And so it is, if they had upon sudden that occasion gone into the fields and fought, and the one had killed the other: this had been but manslaughter."
85 "Hale, op. cit. supra note 6 at 437.
86 "In manslaughter there can be no accessories as before the fact, for it is presumed to be sudden, for if it were with advice, command, or deliberation, it is murder and not manslaughter, and the like of se defendendo."
87 See also, IV Blackstone, op. cit. supra note 25 at 36.
88 Foster, op. cit. supra note 25 at 315.
89 Hale, op. cit. supra note 6 at 453.
91 "Two boys fought and one of them who was beaten, and had got a bloody nose, ran home to his father, and complained of what had happened. The father imme-diately ran to the place three quarters of a mile distant, and after he had called the boy with whom his son had been fighting, villian, and used some other appro- priate terms, he struck him a single blow on the head, and it afterwards occasioned his death. He was tried, and a special verdict was found; and upon its being brought to the King's Bench, 9 Jac. it was held that he was guilty of manslaughter, because done in sudden heat and passion."
92 Brief of the case quoted from Bevill, Homicide (1799) 73.
93 Foster, op. cit. supra note 25 at 291; East, op.cit. supra note 79 at 252-253; St. Phil., op. cit. supra note 58 at 163, n. 1; 166.
adequacy of provocation and the suddenness of provocation Foster seems to have the best statement of the law of cooling time when he stated, "and indeed in every other case of homicide upon provocation how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder." The similarity between the language of this rule and the rule stated by Perkins is striking.

Having thus noted that there has been little or no change in the four major elements of the rule of provocation, that is, adequacy of provocation, heat of passion, suddenness of provocation, and cooling time, since the time of Hale, let us now consider what acts constituted adequate provocation during this period. The old term chance medley covered the whole field of sudden contention or brawl according to Coke's definition. This term was probably too broad to satisfy the common law judges and the term lost much of its strength in being misinterpreted and confused. In order to allow for some degrees of provocation, chance medley was laid aside, and a series of rules based on cases grew up to form the law of provocation based on sudden affray. An affray occurs when two persons meet; words and gestures pass between them; then words and an assault ensues; then a battery; and then a combat develops. Whether a homicide is murder or manslaughter depends on when in this chain of events the fatal blow was struck. Where along this chain of events there was sufficient provocation engendered was the question to be decided. Hale set out the law and since that time there has been little or no change. Words and

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90 Foster, op. cit. supra note 25 at 296.
90 Perkins, op. cit. supra note 3 at 423.

"No matter how extreme the provocation, or how great the passion engendered thereby, there will be no mitigation sufficient to reduce voluntary homicide to manslaughter in the absence of another requirement. That is, the fatal act must have followed the provocation before there had been a reasonable opportunity for the passion of the slayer to cool."

91 Coke, loc. cit. note 48.
92 Foster, op. cit. supra note 25 at 258.

"Homicide occasioned by Accident, which human Prudence could not foresee or prevented, improperly called Chance-medley."

IV Blackstone, op. cit. supra note 25 at 184.

"But the self-defense, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word chance-medley, or (as some rather choose to write it) chaude-medley; the former of which in its etymology signifies a casual affray, the latter an affray in heat of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide by misadventure;"

93 Hale, op. cit. supra note 6 at 456; Foster, op. cit. supra note 25 at 290; Stephen, op. cit. supra note 58 at 165; Perkins, op. cit. supra note 3 at 419.
tion sufficient to mitigate murder to manslaughter. But if the words expressed an intention to do bodily harm or were accompanied by some act which constituted an assault, however slight, there might be sufficient provocation to reduce murder to manslaughter. If the affray reached a stage where an assault by one of the parties occurred, real difficulties arose. It is doubtful whether less than an aggravated assault was adequate provocation in Hale’s time, but an assault accompanied by a battery, a blow sufficient to kindle the blood (a slight blow was not enough) was adequate provocation to reduce murder to manslaughter. If the affray reached the stage of mutual combat before the fatal blow was struck it was almost universally held to be no more than manslaughter. Since in the time of Hale and Foster most

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84 HALE, op. cit. supra note 6 at 455, citing Brain’s Case, Cro. Eliz. 778, Kel. 131; Foster, op. cit. supra note 25 at 290; Stephen, op. cit. supra note 58 at 165; Perkins, op. cit. supra note 3 at 421.

85 HALE, op. cit. supra note 6 at 436.

86 Adequate provocation may sometimes be established by a combination of insulting words with some other circumstance which would not itself be sufficient. For example, insulting words plus a blow too slight for provocation, and the same is true of insulting words plus aggravated trespass to property.

87 Stedman’s Case, Old Bailey, MSS Tracy and Denton (1704).

88 This abstract of the case is from Foster, op. cit. supra note 25 at 292.
men carried swords or other deadly weapons and the doctrine that
one must "retreat to the wall" before a slaying could be excused as
self-defense was in full sway in the law, a great deal of time and space
is devoted to these problems in the works of these authors.\textsuperscript{100} Numerous cases are given to show the distinction between self-defense, man-
slaughter, and murder where homicide occurred in the course of a
sword fight.\textsuperscript{101} These cases have little practical value today, but the
division which they have created in the law of provocation still per-
sists. Perkins has five sub-heads under the heading of adequate provo-
cation in his outline, words, gestures, assault, battery, and mutual
quarrel or combat.\textsuperscript{102} In these five headings we may well find the
survival of most of the elements that constituted Coke's chance medley

Although Coke seems to recognize but one form of provocation, by
Hale's time other forms of provocation had grown up. Among these
was trespass to property. Trespass as used here means a bare trespass
on property, real or personal, and is not to be considered as the un-
lawful act of trespass.\textsuperscript{103} Certainly the property minded common law
judges would not hold the defense of one's person in higher esteem
than the defense of one's property. Thus it was not long after tres-
pass to one's person, sudden affray, had been established as adequate
provocation to mitigate murder to manslaughter, that trespass to one's
property appeared as such provocation. Hale gives examples of tres-
pass on real property as mitigation of homicide to manslaughter,\textsuperscript{104}
and states, "If a man comes to take my goods as a trespasser, I may
justify the beating of him in defense of my goods, as hath been said;
but if I kill him, it is manslaughter."\textsuperscript{105} Foster seems not to be so
much in sympathy with the doctrine of trespass on property as pro-
vocation, but nevertheless he states that if one finds a trespasser on
his land and in the first transport of his passion beats him and un-
luckily kills him it is only manslaughter, but cites Hale as authority
and quickly adds that if a deadly weapon or unreasonable force is
used it will be murder.\textsuperscript{106} Bevell states that one who kills in abuse of

\textsuperscript{100} Hale, \textit{op. cit. supra} note 6 at 452-453, 467-470, 478-485; Foster, \textit{op. cit. supra} note 25 at 273-278.

\textsuperscript{101} Ibid.

\textsuperscript{102} Perkins, \textit{op. cit. supra} note 3 at 413-421.

\textsuperscript{103} Hale, \textit{op. cit. supra} note 6 at 485-486.

\textsuperscript{104} See: Wilner, \textit{Unintentional Homicide in the Commission of an Unlawful Act}
(1939) 87 U. of Pa. L. Rev. 811.

\textsuperscript{105} Hale, \textit{op. cit. supra} note 6 at 440, 444-445, 485-486.

\textsuperscript{106} Hale, \textit{op. cit. supra} note 6 at 486.

\textsuperscript{106} Foster, \textit{op. cit. supra} note 25 at 291.
his right to defend a house is guilty of manslaughter only. Russell and East cite Hale and hold that trespass on one's land may be sufficient provocation to make a homicide resulting from such trespass no more than manslaughter. It would seem that trespass to property had been firmly established as sufficient provocation in the nineteenth century, but Stephen differs. In setting out those acts which will not constitute provocation Stephen lists specifically "injuries to property." This seems to be a misstatement of the law and probably represents Stephen's personal feeling on the subject. Perkins states that aggravated trespass on a dwelling house may be sufficient provocation to reduce murder to manslaughter and cites fairly recent cases holding trespass to property to be such provocation. Thus it would seem that Stephen spoke as a humanitarian rather than a judge when he made his statement that injury to property was not provocation, but the law has traveled far from the views of Hale on the subject and trespass to property, real or personal, as adequate provocation to reduce murder to manslaughter seems to be passing out of the criminal law.

There were acts other than trespass on the slayer's person or property which constituted adequate provocation in Hale's time. These acts still constitute adequate provocation and several new acts have been added to the list. The first and most frequently noted of these provocations is that of a husband detecting his wife in the act of adultery, which a judge in Hale's time stated was the greatest of provocation and therefore admonished the executioner to burn the slayer's hand gently. This doctrine has been extended to include any near female relative of the slayer. Stephen added to the list the sight of the act of sodomy on the slayer's son and Perkins has added seduction of the slayer's infant daughter. Closely allied with this problem is the question of whether or not the act constituting the provocation in the case of an assault, battery and mutual combat must be

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92 Bivill, op. cit. supra note 87 at 67-70.
In the preface to his book Bivill states, "I have given a distinct explanation of the law upon Manslaughter, in all its branches: this, I believe, has not been hitherto attempted; and as far as depends upon the law, I trust that I have succeeded in explaining the precise distinctions between that offence and Murder."
The book falls short of the expectations of its author.
93 Russell, op. cit. supra note 79 at 519.
94 East, op. cit. supra note 79 at 236.
95 Stephen, op. cit. supra note 58 at 165.
96 Perkins, op. cit. supra note 3 at 421-422.
97 Hale, op. cit. supra note 6 at 486, m. (d).
98 Perkins, op. cit. supra note 3 at 422.
99 Stephen, op. cit. supra note 58 at 165; See also, Russell, op. cit. supra note 79 at 581.
100 Perkins, op. cit. supra note 3 at 422.
against the slayer or may the slayer act in defense of relatives or friends. *Rooley's Case* was an example of provocation where the assault and battery had been against the slayer's son, and other cases have been cited by Hale and Foster where it has been held to be only manslaughter when a servant comes to the aid of his master. Stephen states the proposition well when he said:

"Provocation to a person by an actual assault, or by a mutual combat, or by a false imprisonment, is in some cases provocation to those who are with that person at the time, and to his friends who, in the case of mutual combat, take part in the fight for his defense. But it is uncertain how far this principle extends."

The exact place that illegal arrest occupied in the law of manslaughter during this period is not altogether clear. Stephen states that an unlawful arrest will be adequate provocation to the person arrested but not to a bystander. The cases given by Hale and Foster do not make it clear whether a homicide occurring in the course of an illegal arrest was manslaughter because the false arrest constituted adequate provocation or for reasons unrelated to the question of provocation. But there are a sufficient number of cases to be found to justify the statement that an unlawful arrest will constitute adequate provocation.

Perkins attempts to show that there is mitigation other than provocation and cites a few modern cases which seem to support this idea. Whether there is mitigation other than provocation does not concern us here since it seems to be a new idea in the law. There is nothing in the early writings and cases on the subject of manslaughter which indicate to the writer that such a problem was even considered before the early part of the twentieth century.

Thus far all the cases considered have involved voluntary manslaughter, that is, the slayer intended to commit the homicide but the circumstances were such as to allow the crime to be mitigated from murder to manslaughter. If we disregard mitigation other than provocation, and historically it must be ignored, we find only cases involving provocation falling under the head of voluntary manslaughter. We now turn to involuntary manslaughter which may be divided

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117 *Hale, op. cit. supra* note 6 at 484, 446; *Foster, op. cit. supra* note 25 at 312-315.
118 *Stephen, op. cit. supra* note 58 at 168-169.
119 *Stephen, op. cit. supra* note 58 at 165.
120 *Hale, op. cit. supra* note 6 at 457-459, 490; *Foster, op. cit. supra* note 25 at 271, 311, 312, 318.
121 Perkins, *op. cit. supra* note 3 at 426.
MANSLAUGHTER

into two general divisions, first, homicide resulting from an unlawful act, and second, homicide resulting from criminal negligence. Involuntary manslaughter poses one of the most difficult problems in the criminal law. Here the fact that manslaughter is a catch all phrase, under which a great unrelated mass of unexcusable and unjustifiable homicides which are not committed with malice aforethought are listed, is most clearly demonstrated.

From the time of Hale the degree of culpability of homicide occurring in the course of an unlawful act depended on the nature of the unlawful act. If the act was *malum in se* the homicide was murder or manslaughter according to the degree of violence involved or probability of death resulting from the act. If the unlawful act was a mere trespass or *malum prohibitum* the homicide was either manslaughter or excusable as misadventure according to the degree of danger involved and the manner in which the act was committed. If the unlawful act amounted to a felony the homicide was murder, but it did not follow that if the unlawful act was only a misdemeanor the homicide was manslaughter. These principals can best be illustrated by giving a few of the case cited by the various authors.

The classic example of homicide in the course of an unlawful act was given by Coke and it has been repeated by later authors. If A shoots B’s fowl with the felonious intent to steal it, but by accident kills C, A is guilty of murder, but if A had no intention of stealing B’s poultry it will barely be manslaughter. But even as to this classic example there is some disagreement, because Hale believed the slayer would be guilty only of manslaughter even though he had intent to steal the fowl because the unlawful act was not of a malicious nature.

If one unlawfully intended to injure another, as throwing a stone at him, and death results from such an act it is manslaughter because even though the unlawful act was *malum in se* it was not such an act as would ordinarily be calculated to result in death.

If there was a statute prohibiting a person of less than certain wealth or position from possessing a gun and A, in violation of this

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1. Hale, op. cit. supra note 6 at 475-476; Foster, op. cit. supra note 25 at 258-259; Stephen, op. cit. supra note 58 at 162-163; IV Blackstone, op. cit. supra note 25 at 192.
2. Foster, op. cit. supra note 25 at 258; Stephen, op. cit. supra note 58 at 164.
3. Coke, op. cit. supra note 16 at 56.
4. Hale, op. cit. supra note 6 at 475; Foster, op. cit. supra note 25 at 258-259; Stephen, op. cit. supra note 58 at 164.
5. Hale, op. cit. supra note 6 at 475.
6. Hale, op. cit. supra note 6 at 472, but see 39, 475; Foster, op. cit. supra note 25 at 259-261; Stephen, op. cit. supra note 58 at 162-163.
statute, accidently kills B while hunting, he is only guilty of manslaughter because the unlawful act was *malum prohibitium*.\(^{128}\)

Where a homicide occurred in the course of a sporting contest whether the slayer was guilty of manslaughter or was excused depended upon whether or not the sporting event was lawful. If the sporting contest was lawful the homicide was held to be merely *per infortunium* and the slayer excused.\(^{129}\)

The common law of England was much concerned with avoiding breaches of the King's peace and the early writers dwell at some length on riots, sedition, resisting of sheriffs' posses, and confederating to commit a breach of the peace.\(^{130}\) In all of these cases involving what might be termed mass violence, it will be noted that the participants were held guilty of murder and not manslaughter, where a homicide resulted in the course of their unlawful act. One case cited by Hale is of interest in that a homicide resulting from an assault on a house by twenty persons, the house being defended by thirty persons, was held to be manslaughter because there was said to be sudden *provocation*.\(^{131}\) This would indicate that the early judges were not willing to hold that a homicide resulting from a violent unlawful act was less than murder, but were willing to distort the facts in order to reduce murder to manslaughter where the circumstances did not justify a conviction for murder.

Where a homicide occurred in the course of an unlawful act it was necessary to show that the homicide occurred in pursuance of the unlawful purpose in order to hold those participating in the unlawful scheme for murder or manslaughter. This principle is well illustrated by *Plummers Case*\(^{132}\) where a band of smugglers were resisting the king's officers and one of the smugglers killed an accomplice. It was held that if the jury found that the homicide was the result of a preconceived malice by the slayer against the deceased, then the slayer alone could be held for murder and his confederates were not guilty.

\(^{128}\) Hale, *op. cit. supra* note 6 at 475; Foster, *op. cit. supra* note 25 at 259.

\(^{129}\) Coke, *op. cit. supra* note 16 at 56; Hale, *op. cit. supra* note 6 at 473; Foster, *op. cit. supra* note 25 at 259; East, *op. cit. supra* note 79 at 268-271.

"A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act: and so are boxing and swordplaying, the succeeding amusements of their posterity; and therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command or permit such diversions it is said to be only misadventure; for then the act is lawful."

IV Blackstone, *op. cit. supra* note 25 at 183.


\(^{131}\) Case of Drayton Basset, Hale, *op. cit. supra* note 6 at 444.

\(^{132}\) 12 Mod. 627, 88 Eng. Rep. 1565 (1701).
because the homicide did not occur in pursuance of their unlawful smuggling scheme.

Having considered briefly what the early writers considered to be the law relative to homicide committed in the course of an unlawful act, we now turn and compare these views with the present day law as stated by Perkins. In discussing involuntary manslaughter occurring in the course of an unlawful act Perkins has considered the problem under two general headings, "The nature of the unlawful act," and "Causal relation between the unlawful act and death." In considering the nature of the unlawful act Perkins states that if the act is malum in se the homicide is not excusable, but will be murder or manslaughter, in the absence of a statutory excuse, regardless of the element of human risk involved. If the unlawful act is malum prohibitum only, the homicide will be manslaughter, only if the act is done wilfully or so recklessly as to amount to criminal negligence, otherwise the homicide is excusable. Thus it would seem that the law has progressed little since the time of Foster who stated

"For if the act be unlawful, I mean if it be malum in se, the case will amount to felony, either murder or manslaughter, as the circumstances may vary the nature of it. If it be done in prosecution of a felonious intention it will be murder, but if the intent went no further than to commit a bare trespass, manslaughter."

Perkins states that there must be a casual connection between the death and the unlawful act in order to hold the slayer guilty of culpable homicide. As we have seen Plummer's Case establishes that even in Hale's time there must be some casual relation between the homicide and the purpose of the unlawful act in order to hold the slayer guilty of manslaughter in the course of an unlawful act. Here again it is shown that the law as laid down by Hale three centuries ago is applicable today.

In discussing the second subdivision of involuntary manslaughter, criminal negligence amounting to manslaughter, we will not attempt to trace the crime to its root or attempt to draw any fine distinctions.
between what degrees of criminal negligence will be required to constitute murder or manslaughter. We will merely give a brief history in very broad and general terms.

Criminal negligence is a refinement growing out of *per infortunum* which, as has been indicated, was excusable homicide resulting from accident or misadventure. Whether or not criminal negligence existed in Coke's time does not concern us here, but it is clear that it had emerged as a distinct criminal act by the time of Hale. In this discussion we will consider homicide by accident to be that act described by Foster when he stated:

"This species of homicide is where a man is doing a lawful act without intention of bodily harm to any person, and using proper caution to prevent danger, unfortunately happeneth to kill." And we will consider homicide by criminal negligence to be the failure to use that caution.

With these premises in mind we turn now to the various cases given by the writers as illustrating manslaughter resulting from criminal negligence. The first and standard example of criminal negligence is based on *Hull's Case* where a workman threw a timber from a building and killed a man below. It was stated that if the workman knew that there was likely to be people below and he did not give proper warning before throwing the timber, he was guilty of murder; if a person only occasionally came near the building then the workman must give warning before throwing the timber or he was guilty of at least manslaughter; but if the building was so removed that no person had ever been seen near the building and the workman threw down the timber without warning and killed a person below then the workman was excused since it will be deemed that the homicide was the

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141 Id. at 3-4.
142 HALE, *op. cit., supra* note 6 at 39, 472; MORELAND, *op. cit. supra* note 113 at 5.
143 FOSTER, *op. cit. supra* note 25 at 258.
144 Moreland submits as a proposed definition of criminal negligence the following:

"(1) Criminal negligence is conduct creating such an unreasonable risk of harm to life, safety, property or other interest for the unintentional invasion of which the law prescribes punishment, as to be recklessly disregardful of such interest. The standard of conduct to be applied is that of a reasonable man under like circumstances.

(2) Criminal negligence may be either:

(a) An act which the actor as a reasonable man should realize as involving under the circumstances a reckless disregard of an interest of others, or

(b) A failure to perform a legal duty which the actor as a reasonable man should realize amounts to a reckless disregard for human life and safety under the circumstances."

result of misadventure. This is the example given by most of the writers and may well be considered the best historical illustration of the varying degrees of criminal and non-criminal negligence.

The correction of a child by his parent or a servant by his master was a lawful act and if death resulted from such correction the homicide was excusable as per infortunium. But if it were shown that unreasonable or excessive force was used or that a dangerous or deadly weapon was used in the correction, the slayer was guilty of at least manslaughter. For example, in a case cited by East a son had been guilty of frequent thefts and when a new theft was reported to his father, the father, in a rage, beat the son with a rope causing his death. This was held to be manslaughter.

The wilful neglect of a dangerous beast, known to be likely to cause harm, which escapes and kills an innocent person, was an example of criminal negligence amounting to manslaughter cited by early writers.

In addition to these special examples cited, numerous other cases were given by these writers. Many of these cases present interesting and unusual problems such as Sir John Chichester's Case where a master killed a favorite servant while playing and Rampton's Case where a husband accidentally shot his wife with a pistol which he had found, believing it not to be loaded. A general review of these cases indicates when in the course of human affairs a homicide occurred unexpectedly and without intent of the slayer, he was guilty of at least manslaughter if he failed to use that degree of care which was

146 Hale, op. cit. supra note 6 at 472; IV Blackstone, op. cit. supra note 25 at 192. See Stephen, op. cit. supra note 58 at 163.
Hale cites another illustration of the degrees of criminal negligence. If A drives his cart over a child intentionally and kills the child it is murder; if A drives his cart in such a reckless manner that the child was killed but the death could have been avoided but for A's reckless driving, it is manslaughter, and if A is driving along the street and a child dashes in front of his cart and is killed it is misadventure only.

147 Hale, op. cit. supra note 6 at 454, 473-474; Foster, op. cit. supra note 25 at 262.
148 Ibid.
149 East, op. cit. supra note 79 at 261.
150 Hale, op. cit. supra note 6 at 431.

It was noted that under the Mosaic Law the owner of an ox, known to have gored a man in the past, failed to safely keep the ox and it killed a man suffered death.

Exodus XXI, 29.
proportionate to the probability of death resulting from his acts.\textsuperscript{153} Perkins does not dwell at length with manslaughter resulting from criminal negligence\textsuperscript{154} and his brief discussion adds little to what the writers already considered have to say on the problem. We have not attempted here to analyze criminal negligence amounting to manslaughter, but merely attempted to show that this type of manslaughter has been recognized in its present day meaning since the time of Hale.

The most striking fact to be perceived from this survey of the crime of manslaughter from Bracton to today is the lack of any substantial change in the law since the time of Hale. Viewed historically, the crime of manslaughter may be divided generally into two principal categories; first, voluntary manslaughter which include the cases involving provocation and heat and passion; second, involuntary manslaughter which can be subdivided into two parts, first homicide occurring in the course of a non violent unlawful act, second, homicide resulting from a degree of criminal negligence. This categorization is the same as that given by Perkins and seems to be historically sound.

\textsuperscript{153} Hale, op. cit. supra note 6 at 40, 430-431, 454, 457, 472, 476; Foster, op. cit. supra note 25 at 260, 263, 299; Stephen, op. cit. supra note 58 at 163-164; IV Blackstone, op. cit. supra note 25 at 182-183, 192.

\textsuperscript{154} Perkins, op. cit. supra note 3 at 434.