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A SUGGESTED CLASSIFICATION OF "PROVOCATION" IN MANSLAUGHTER CASES.

"Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is so done in the heat of passion, caused by provocation, "1 Such was the classical definition of voluntary manslaughter. The simple verbiage belies the difficulty encountered when application of the definition is attempted. First, what is meant by the words "heat of passion"? Second, what constitutes "provocation"? It is readily seen that heat of passion denotes an emotional state of a man's mind while provocation obviously refers to those acts which arouse the mind to such an emotional state. The justification of this doctrine grows out of the realization of the law that human frailty is such that when man is sufficiently aroused by heat of passion his ability to control the exercise of his reason is greatly diminished.

Provocation must consist of acts of a particular kind. Words alone are not sufficient.² In order to reduce a homicide from murder to manslaughter the provocation must be of such a character as naturally would be calculated to excite and arouse, and it must appear that the party acted under the smart of his sudden passion and resentment⁴ which must be present when the killing occurs.⁵ Although the law does not set a definite time following the provocation and say that after this time the offense is murder, it does require that the fatal blow be struck before a reasonable man's passion would have subsided⁶ as the test is objective.⁷ However, if the defendant's passion had actually cooled or never was aroused, the test becomes subjective in his case, and he is guilty of murder.⁸

While courts generally refer to an assault as being a sufficient basis for giving an instruction on provocation,⁹ an examination of the

¹ STEPHEN, A DIGEST OF THE CRIMINAL LAW (1877) 164.

State v Burrell, 298 Mo. 672, 252 S.W. 709 (1923)

Martin v Commonwealth, 184 Va. 1009, 37 S.E. 2d 43 (1946)

But see Commonwealth v Hourigan, 89 Ky 305, 12 S.W. 550 (1889).

⁴ People v Bruggy 93 Cal. 476, 29 Pac. 26 (1892).

⁵ Ballard v Commonwealth, 156 Va. 980, 15 S.E. 222 (1931).

⁶ Arnold v State, 179 Ark. 1066, 20 S.W. 2d 189 (1929).

McHargue v Commonwealth, 231 Ky 82, 21 S.W. 2d 115

(1929) State v Nevares, 36 N.M. 41, 7 P. 2d 933 (1932)

Green v State, 195 Ga. 759, 25 S.E. 2d 502 (1943), Cavanaugh v Commonwealth, 172 Ky 799, 190 S.W. 37 (1902).

⁹ Perry v State, 185 Ga. 408, 195 S.E. 175 (1938). However Perkins, *The Law of Homicide* (1946) 36 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 391, 414, weakly contends that an assault is sufficient provocation basing his argument on *Beasley v State*, 64 Miss. 518, 8 So. 234 (1886) and *Swain v. State*, 151 Ga. 375, 107 S.E. 40 (1921). Neither is based upon assault alone, while in *Ford v State*, 40 Tex. Cr. R. 280, 50 S.W. 350 (1899) the problem is squarely faced and the court concludes that an assault alone is not sufficient.

cases reveals that what is actually required is a battery. Although it is difficult to define the nature of the offense required, it is universally held that the battery must not be trivial¹⁰ and the killing must be unaccompanied by malice.¹¹ The general rule appears to be that where there is physical violence accompanied by pain and bloodshed, sufficient provocation exists to reduce the homicide to manslaughter.¹²

Analogous to the battery cases are those involving injury to relatives of close kin. Though the exact connotation to be placed upon the phrase "close kin" is not certain, a personal injury inflicted on one's mother,¹³ wife,¹⁴ brother¹⁵ or son¹⁶ may be sufficient.

The contention that mutual combat lies within the field of provocation seems, by this writer, to be fallacious. These cases theoretically arise when both participants suddenly fight and culminate when one party is killed. The Georgia Supreme Court in speaking of mutual combat has said that voluntary manslaughter "is of two types, the one being based upon passion and the other on the principle of mutual combat."¹⁷ The Kentucky court in rationalizing these types of cases has said that provocation is in the nature of acts of a particular kind which are *unwillingly* thrust upon the defendant, while mutual combat is in the nature of acts *voluntarily* or *willingly* entered into. The voluntariness of the act therefore, furnishes the basis for the decision and consequently eliminates the element of provocation.¹⁸ It is readily admitted by this writer that there may be a better rationalization of these cases, but a non-exhaustive examination of the subject has failed to disclose it. Whatever may be the rationalization, the correct conclusion, it is believed, is that in those cases where the offense is reduced from murder to manslaughter as a result of mutual combat, a category of manslaughter separate and distinct from that involving provocation has been established.

Contrary to popular belief, catching one's spouse in the act of adultery does not by the "unwritten law" justify the killing of either or both of the parties so engaged. If one actually catches a

¹⁰ 26 AM. JUR. 172 (1936).

¹¹ *Caldwell v. State*, 203 Ala. 412, 84 So. 272 (1919)

¹² *Butler v. State*, 108 Tex. Cr. R. 643, 2 S.W. 2d 254 (1928), *Webster v. State*, 105 Tex. Cr. R. 600, 289 S.W. 689 (1927)

¹³ See: *Jacobs v. Commonwealth*, 132 Va. 681, 111 S.E. 90, 93 (1922)

¹⁴ *State v. Johnson*, 6 S.W. 2d 898 (Mo. 1928)

¹⁵ See: *Commonwealth v. Russogulo*, 263 Pa. 93, 106 Atl. 180 (1919) (Statement of trial judge)

¹⁶ *Hickox v. State*, 104 Tex. Cr. R. 649, 285 S.W. 621 (1926) *But see: Roebuck v. State*, 113 Tex. Cr. R. 112, 18 S.W. 2d 643 (1929)

¹⁷ *Watson v. State*, 66 Ga. App. 242, 17 S.E. 2d 559, 560 (1941)

¹⁸ *Hanna v. Commonwealth*, 242 Ky. 584, 46 S.W. 2d 1098, 1100 (1932).

spouse in the act of adultery and kills either or both of the parties immediately there is ordinarily sufficient provocation to reduce the offense to manslaughter.¹⁹ If, however, there was a preconceived plan to entrap combined with an intent to kill, the offense is murder.²⁰ Likewise mere knowledge of past acts is not sufficient²¹ nor is it sufficient if a period of time has elapsed in which the passion of a reasonable man would have subsided.²² There also are cases tending to show that the principles above stated apply where a father²³ or brother²⁴ kills one whom he detects in adultery or illicit intercourse with his daughter or sister. It is believed that this is a reasonable extension.

Another broad field of provocation is found in the cases involving illegal arrest. Stated broadly the rule seems to be that one who resists²⁵ a known illegal²⁶ arrest is guilty of manslaughter if a killing occurs, only in the absence of express malice.²⁷ It has been so held both where the identity of the officer is known²⁸ and where it is unknown.²⁹ It may also apply to one aiding the party illegally arrested.³⁰

It is submitted that the acts which the law recognizes as sufficient legal provocation for the reduction of an intentional homicide to manslaughter fall into three general classes. They are:

1. Actual physical injury to the person or to a close relative.
2. Illicit intercourse being practiced by or upon one of close kin.
3. Resistance to a known illegal arrest.³¹

The key to the law of provocation seems to be found in the word "shock." In every instance where provocation is found, the law

¹⁹ Crowder v State, 208 Ala. 697, 93 So. 338 (1922)

²⁰ People v Gingell, 211 Cal. 532, 296 Pac. 70 (1931) State v. Agnesi, 92 N.J. Law 53, 104 Atl. 299 (1919) State v Imundi, 45 R.I. 318, 121 Atl. 215 (1923)

²¹ Garcia v People, 64 Colo. 172, 171 Pac. 754 (1918), Humphreys v State, 175 Ga. 705, 165 S.E. 733 (1932).

²² Collins v State, 88 Fla. 578, 102 So. 880 (1925)

²³ See: Patterson v State, 134 Ga. 264, 67 S.E. 816 (1910).

²⁴ See: Teague v State, 67 Tex. Cr. R. 41, 148 S.W. 1063, 1064 (1912)

²⁵ People v Gilman, 47 Cal. App. 118, 190 Pac. 205 (1920), State v. Cates, 97 Mont. 173, 33 P. 2d 578 (1934)

²⁶ See: Ex parte Sherwood, 29 Tex. App. 334, 15 S.W. 812, 813 (1890).

²⁷ Giddens v State, 154 Ga. 54, 113 S.E. 386 (1922) State v. Kuykendall, 37 N.M. 135, 19 P. 2d 744 (1933)

²⁸ People v White, 333 Ill. 512, 165 N.E. 168 (1929).

²⁹ People v Scalisi, 324 Ill. 131, 154 N.E. 715 (1926)

³⁰ Bergman v State, 160 Miss. 65, 133 So. 208 (1931)

³¹ Dickey, *Culpable Homicide in Resisting Arrest* (1933) 18 CORN. L. Q. 373.

presumes that although the offense was intentional, the human capability for prudent judgment has been so stupified by the acts done that the reaction is in the form of a violent impulse.³² The temporary shock involved while mitigating the offense does not extinguish it. The existence of the doctrine is justified only by the fact that man is an imperfect machine and the maintenance of it rests upon the fact that through the generations he has not shown an inclination to become a perfect one.

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³² Sanders v. State, 26 Ga. App. 475, 106 S.E. 314 (1921)