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EARLY DEVELOPMENT OF THE TERM MALICE AFORETHOUGHT AND ORIGINS OF EXPRESS MALICE

Perhaps the most ambiguous term in the law of homicide is that of malice aforethought. During the twelfth and thirteenth centuries when the term first began to be used, it had little meaning other than that of intentional wrongdoing. It was a vague term, having no reference to spite or hatred. Murder at that time was a term given only to those homicides committed in secret, such as by way-laying or poisoning, and was not distinguished from other types of homicide by any mental element. Malice aforethought when it was first used had no particular relation to the crime of murder; but we find that the term premeditated assault was used to describe assaults of a severe nature, and it seems to have been through a gradual and somewhat unreasoned linking together of the offenses and terms *assultus prae-meditatus*, *felonia*, and *malitia* that the term malice aforethought was evolved.

There were, apparently, three groups of homicide in early English law; those which were justifiable, such as the execution of a lawful sentence of death; those which were excusable, because of self-defense or mis-adventure; and those which were felonious.

In Bracton's day every homicide which was not justifiable or excusable was felonious, was considered to have been committed by "premeditated assault" or by "malice aforethought", and was punished by death. Apparently little thought, however, was given to the exact meaning of these words. They seem to have been used merely to distinguish felonious homicides from the other two groups of homicides referred to above.

During the reign of Henry III, in the thirteenth century, the term came into quite general use in the numerous pardons which were granted to those persons who had committed homicide by

1 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 469, especially footnote 1.
2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 487-488.
4 Id. at 468.
5 Id. at 468, 469.
7 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 311-312; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 485.

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mis-adventure, in self-defense, or while of unsound mind." It is difficult to know just what meaning was attached to the term, but a typical pardon ran somewhat as follows: Whereas we have learned by an inquest taken by AB that CD slew XY by mis-adventure and not by felony or malice aforethought."

Throughout the next two centuries, malice aforethought was used and defined in a series of statutes. The first which seems to have given recognition to the term was that of 13 Richard 2, s.2, c.1 about 1389. As these statutes were passed they gradually excluded from benefit of clergy those homicides which were considered "murder prepense" or "murder upon malice prepense". While all homicides were punishable by death, and there was at first no crime comparable to our present day manslaughter, we do see in these statutes a distinction between murder and some lesser degree of homicide in that "murder by waylaying, assault, or malice prepense was not within the terms of any general pardon."

Thus by slow steps homicide, during the fifteenth and sixteenth centuries, came to be called murder if it was done with malice aforethought, and it was punished with death. Its first use seems to have been in the cases of killings committed in waylaying which were, naturally, done with a sense of premeditated design.

By the end of the sixteenth and the beginning of the seventeenth century we find numerous persons writing legal treatises. Bracton, who had written in the twelfth century, was widely read at this time, and his influence was greatly felt. Lambard, apparently, was the first of these writers to give an account of the meaning of the term malice aforethought, it being assumed by him that it was used in its natural and obvious sense of premeditation.

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14 2 Pollock and Maitland, History of English Law (2d ed. 1911) 469; Perkins, A Re-examination of Malice Aforethought (1934) 43 Yale L. J. 537.
Perhaps he was the first, also, to give an example of what is known today as the deadly weapon doctrine. Since few people make any express statement about their intention to commit murder, express malice (malice in fact), as distinguished from implied malice (malice in law), must often be inferred. This fact was gradually realized as the term malice aforethought came into more frequent use. Thus it was natural that statutes embodying the term malice aforethought increasingly received a broader interpretation so as to include both the concept of express malice and also its present day sub-divisions. Lambard undoubtedly realized this when he wrote of homicide by the use of a dangerous weapon without any expressed statement of intention by the actor.

Malice aforethought and its relation to malice in fact received yet further explanation and development in the writings of Coke in the latter part of the seventeenth century. He distinguished between malice aforethought which was "... expressed by the party ... (and that malice which is) implied by law ...,"7 saying that malice prepensed occurs "... when one compasseth to kill, wound, or beat another, and doth it sedato animo."7 It would seem that this definition of malice is broader than earlier ones in that it includes not only an intent to kill but also an intent to wound or beat. We see also another enlargement of the term malice in Coke's writings when he says that "this malice is so odious in Law, as though it be intended against one, it shall be extended toward another."7 It is interesting to note however, that in giving this apparent example of transferred intent, Coke cited Bracton. For this reason it would seem that the theory of transferred intent may date back to the twelfth century, but whether it actually did in fact or not we do know that it was in existence in the seventeenth century when Coke was writing.

During the next century, Hale further clarified and extended the definition of the term malice, approaching very closely the

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1. "Many times the law doth by the sequel judge of that malice which lurked before within the party, and doth accordingly make imputation of it. And therefore if one (suddenly and without any outward show of present quarrel or offense) draw his weapon and therewith kill another that standeth by him, the law judgeth it to have proceeded of former malice, meditated within his own mind, however it be kept secret from the sight of other men. . . ." 3 Stephen, History of Criminal Law of England (1883) 50 citing Lambard, p. 205. Stephen refers to this as implied malice, but the writer believes that if this is a reference to what is now known as the deadly weapon doctrine it should be grouped under inferred malice (malice in fact) as distinguished from implied malice (malice in law).

2. COKE, THIRD INSTITUTE (1680) 47.

3. Id. at 51

4. "Si quis unum percuserit, cum alium percure vellet, in felonia tenetur." Ibid. citing Bract. lib. 3 fol. 155.
concepts of it that we have today. He stated that murder accompanied by malice aforethought is either express or presumed, and that it is therefore either malice in fact or malice in law." He defined malice in fact (express malice) as a "... deliberate intention of doing any bodily harm to the person of another." This is certainly a broader definition of malice than we have met before, as it includes not only an intent to kill, wound or beat, but an intent to do any bodily harm. He enlarges upon the necessity of malice in fact being more than an expressed intention to do bodily harm by saying that "evidence of such malice must arise from external circumstances discovering that inward intention. . . ." He also discusses the deadly weapon doctrine by saying that "consideration must be had of the manner of the provocation, the danger of the instrument which the master useth, and the age or condition of the servant that is stricken. . . ."

Thus it is that today we have in the law of homicide a term with a meaning very different from the one with which it entered the law. We are able to trace malice aforethought and its relation to express malice (this paper has not been concerned with the later development of implied malice) from the time when it first began to be used and had little more meaning than that of intentional wrong-doing, through the stage when it was used mainly to separate murder from those lesser homicides which were given benefit of clergy, to the present day when it is used to distinguish murder from manslaughter, and is divided into the categories of express malice, inferred malice, and transferred malice.

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1 HALE, PLEAS OF THE CROWN (1778) 451.
21 Ibid.
22 Ibid.
23 Ibid. at 454.
24 Of course this is true of implied malice also.