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## Degrees of Murder and Manslaughter

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### DEGREES OF MURDER AND MANSLAUGHTER

In order to define the degrees of murder under the West Virginia statute, it is necessary that the common law definition of murder be kept in mind. Murder at common law consists of two essential elements: First, the killing of a human being by another, without legal justification or excuse, or provocation reducing it to manslaughter; second, with malice aforethought.<sup>1</sup> The West Virginia Code provides:

“Murder by poison, lying in wait, imprisonment, starving, or any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree.”<sup>2</sup>

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<sup>1</sup> State v. Gravely, 66 W. Va. 375, 66 S. E. 502 (1909), dissenting opinion of Judge Poffenbarger; State v. Abbott, 64 W. Va. 411, 62 S. E. 693 (1908); State v. Abbott, 8 W. Va. 741 (1875). Some authorities add another element, *i. e.*, that the offender must be sane, but it is arguable that the element of malice presupposes sanity by implication. “Malice implies a mind under the sway of reason”, State v. Galford, 87 W. Va. 358, 105 S. E. 237 (1920).

<sup>2</sup> W. VA. REV. CODE (Michie, 1937) c. 61, art. 2, § 1.

This statute, which was identical in language in the Code of 1868 and subsequent codes, does not affect the elements of common law murder, at least in the respect that homicide which was murder at common law, still is murder under the statute. The statute merely divides murder into two classes,<sup>3</sup> murder of the first degree, and murder of the second degree.

Malice, or malice prepense, or malice aforethought,<sup>4</sup> is essential to both degrees of murder.<sup>5</sup> The legal malice required is difficult to define. It appears in an attitude of reckless disregard of human life, in the commission of unlawful acts naturally tending to destroy life, done careless of the consequences.<sup>6</sup> It is not confined

<sup>3</sup> State v. Gravely, 66 W. Va. 375, 66 S. E. 502 (1909), dissenting opinion of Judge Poffenbarger; State v. Dodds, 54 W. Va. 289, 46 S. E. 228 (1903); State v. Abbott, 8 W. Va. 741 (1875).

<sup>4</sup> See State v. Hamrick, 74 W. Va. 145, 81 S. E. 703 (1914) approving an instruction treating "malice" and "malice aforethought" as synonymous.

<sup>5</sup> *D* is driving. His automobile strikes and kills *X* who is drunk and staggers into the road. *D* intentionally fails to stop. Second degree murder, *rev'd*; there is no evidence from which to imply malice. State v. Tharp, 116 W. Va. 256, 180 S. E. 97 (1935).

*D* attempted to stop a fight in his place of business, is knocked down and threatened. He shoots his assailant. Second degree, *rev'd*; error to instruct jury could find second degree murder when the evidence does not support a finding of malice. State v. Cassim, 112 W. Va. 92, 163 S. E. 769 (1932).

*X*, intoxicated, attacks members of *D*'s family, flourishes pistol and threatens to shoot. *D* shoots *X*. Second degree, *rev'd*. There is no evidence to support a finding of malice. State v. Thornhill, 111 W. Va. 258, 161 S. E. 431 (1931).

Without prior altercation, *X* hits *D* on head with a poker and ejects *D* from the house. *D*, angered, shoots and kills *X*. Second degree, *rev'd*; the evidence does not support a finding of malice. State v. Frye, 98 W. Va. 504, 127 S. E. 332 (1925).

*X* assaults members of *D*'s family and threatens *D*. *D* stabs *X* with a paring knife. Second degree, *rev'd*. The evidence is insufficient to show malice. State v. Hurst, 93 W. Va. 222, 116 S. E. 248 (1923).

*X* enters *D*'s place of business and becomes abusive. *D* declines combat. *X* threatens *D* and follows him into adjoining room. *D* shoots *X*. Voluntary manslaughter, *rev'd*. Improper to instruct jury it could find malice. *Rev'd* also for other reasons. State v. Laura, 93 W. Va. 250, 116 S. E. 251 (1923).

*X* strikes *D*, a policeman, in the face. *D*, who was not at fault, then immediately shoots *X*. Second degree, *rev'd*; evidence does not support a finding of malice. State v. Galford, 87 W. Va. 358, 105 S. E. 237 (1920).

And see State v. Long, 88 W. Va. 669, 108 S. E. 279 (1921); State v. Arrington, 88 W. Va. 152, 106 S. E. 445 (1921); State v. Weisengoff, 85 W. Va. 271, 101 S. E. 450 (1919); State v. Panetta, 85 W. Va. 212, 101 S. E. 360 (1919); State v. Snider, 81 W. Va. 522, 94 S. E. 981 (1918); State v. Michael, 74 W. Va. 613, 82 S. E. 611 (1914); State v. Abbott, 8 W. Va. 741 (1875).

<sup>6</sup> *D* fires a gun into a crowd intentionally and recklessly and kills a bystander. First degree, *aff'd*. State v. Saunders, 108 W. Va. 148, 150 S. E. 519 (1929).

*D* beats *X* unconscious to rob him and leaves *X* lying in highway where he is run over by an automobile and killed. Second degree *aff'd*. State v. Caldwell, 108 W. Va. 330, 150 S. E. 754 (1929).

*D*'s car is halted by officers. *D* fires at them, killing *X*, and drives on. Sec-

to ill will toward the deceased, but is intended to denote "an action flowing from a corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain implications of a heart regardless of social duty and fatally bent on mischief."<sup>7</sup> This language, found, with minor variations, in nearly every attempt to define malice is not very specific. Possibly there is no satisfactory definition of malice as an abstraction. It is a term used to denote certain states of mind, and to define malice in the abstract is like an attempt to define a definition. One of the states of mind it describes is that in which an unlawful act, naturally tending to produce death or great bodily harm to another, is committed recklessly and wilfully, and death ensues from it.<sup>8</sup> The statute itself would seem to recognize as one of these states of mind that specific intent which is an element of the crime of arson, or of rape, robbery, or burglary.<sup>9</sup>

Malice may be either express or implied. But the usefulness of the distinction is open to question under the present law. Express malice also is implied, but it is an implication which may be drawn from deliberate conduct, or purposeful acts, denoting a formed design,<sup>10</sup> that is, an implication of fact, arising from external manifestations which support a probability that a certain intent existed. Implied malice is the result of an implication of

ond. degree, *aff'd.* State v. McMillon, 104 W. Va. 1, 138 S. E. 732 (1927).

X, a known officer, mounts D's slowly moving car to stop and arrest D. D increases the speed and collides with a bridge, killing X. If the collision is intentional while the car is moving at a high speed, the homicide is murder; if accidental, involuntary manslaughter. Dictum in State v. Weisengoff, 85 W. Va. 271, 101 S. E. 450 (1919).

And see State v. DeBoard, 194 S. E. 349 (W. Va. 1937); State v. Bowles, 117 W. Va. 217, 185 S. E. 205 (1936), verdicts of second degree murder *aff'd.*

<sup>7</sup> State v. Douglass, 28 W. Va. 297, 299 (1886) quoting 1 EAST, PLEAS OF THE CROWN (1803) 214-215. And see dissenting opinion of Judge Poffenbarger in State v. Gravely, 66 W. Va. 375, 66 S. E. 502 (1909).

<sup>8</sup> State v. Saunders; State v. Caldwell, see facts both cases note 6, *supra*.

D intentionally and recklessly fires a gun into a crowd, killing X. First degree, *aff'd.* State v. Young, 50 W. Va. 96, 40 S. E. 334 (1901).

X attempts to start a fist fight with D in D's barber shop. D stabs X with shears before any blows are struck. Second degree, *aff'd.* State v. Smith, 24 W. Va. 814 (1884).

<sup>9</sup> D kills X while committing rape on X. First degree, *aff'd.* State v. Beale, 104 W. Va. 617, 141 S. E. 7 (1927).

D beats X to death to rob him. First degree, *aff'd.* State v. Williams, 98 W. Va. 458, 127 S. E. 320 (1925).

<sup>10</sup> X orders D out of X's place of business. D goes, returns later, leaving door open, stabs X and escapes through open door. First degree, *aff'd.* State v. Lemon, 84 W. Va. 25, 99 S. E. 263 (1919).

law arising from the act of killing, where nothing in extenuation appears, and where there is no antecedent conduct indicative of the state of mind.<sup>11</sup> The opinions do not often use this language. But these distinctions appear in the cases in another form, to be noted hereafter. It is said that infliction of a mortal wound with a deadly weapon on slight provocation, or none, is *prima facie* wilful, deliberate and premeditated, that is, done with specific intent, hence with malice. This has its basis in the concept of express malice, which is related to the higher degree of murder under the statute. The cases do not define specific intent, except by implication. It appears to be that intent to kill, which is executed upon deliberation and premeditation. It is said that when a homicide is proved, it is presumptively second degree murder. This is based upon the concept of implied malice. Malice need not be directed toward the particular person killed,<sup>12</sup> or toward any particular person,<sup>13</sup> and need not have existed for any particular length of time, if present at the moment of the act.<sup>14</sup> If malice be considered as something residing in the mind, it is evident that it does not need to exist at all in order to have a conviction for murder, where the circumstances are such as to warrant an inference of malice.

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<sup>11</sup> X, drinking and quarrelsome, threatens D. D believes X is armed. Later X approaches D with apparent friendliness. D warns him away, but X continues to approach. D shoots him. The jury could infer malice. Second degree, *rev'd* on other grounds. State v. Shelton, 116 W. Va. 75, 178 S. E. 633 (1935).

D, carrying a revolver, waits at X's home for X to return. While X is sitting with D at dinner, D is handling the weapon recklessly, and it fires. Second degree, *aff'd*. D's conduct is sufficient to imply malice. State v. Hicks, 107 W. Va. 418, 148 S. E. 131 (1929).

D has X arrested and while helping serve the warrant, shoots X without apparent provocation. Second degree, *aff'd*. State v. Bailey, 103 W. Va. 605, 138 S. E. 202 (1927).

D has had trouble with X. He sees X walking by, arms himself and goes to meet X. In an altercation that follows, D shoots X. Second degree, *aff'd*. The jury could infer malice. State v. Cook, 94 W. Va. 166, 117 S. E. 777 (1923).

<sup>12</sup> D, intending to shoot A, by mistake shoots B. First degree, *aff'd*. State v. Davis, 74 W. Va. 657, 82 S. E. 525 (1914).

D intentionally and recklessly fires into a crowd, killing X. First degree, *aff'd*. State v. Young, 50 W. Va. 96, 40 S. E. 334 (1901).

<sup>13</sup> State v. Saunders, 108 W. Va. 148, 150 S. E. 519 (1929) (see facts note 6, *supra*).

See State v. Abbott, 64 W. Va. 411, 62 S. E. 693 (1908), approving an instruction, first degree, *aff'd*; and State v. Douglass, 28 W. Va. 297 (1886).

<sup>14</sup> See State v. Tucker, 52 W. Va. 420, 44 S. E. 427 (1902) (see facts note 23, *infra*).

And see State v. Weisengoff; State v. Panetta, both *supra* n. 5; State v. Welch, 36 W. Va. 690, 15 S. E. 419 (1892).

Motive is not an essential ingredient of murder.<sup>15</sup> While it is arguable that few, if any, murders are committed without some motive, and while logical motive may tend to make proof more certain, yet, in many cases motive may be but speculative, or wholly beyond conjecture. Were it necessary to be proved, conviction in many cases would be impossible.

If the elements of common law murder exist, then under the statute, any of the facts of killing by poison, lying in wait,<sup>16</sup> imprisonment, or starving, will elevate the offense to murder of the first degree, without further proof that the accused premeditated or deliberated.<sup>17</sup> The statute says "murder by poison." If the common law requisites of murder were not made conditions precedent, an accidental administration of poison might be murder of the first degree. It is less clear whether the statute is intended to read: "Murder in the commission of, or attempt to commit, arson, rape, robbery or burglary", or a "killing" under these circumstances. It is to be noted that the four crimes enumerated are crimes of violence. In early times it was considered that these felonies carried in themselves the element of malice aforethought sufficient, together with a homicide, to constitute murder. Under statutes similar to ours, some courts, by dicta, lay down a broad proposition that a homicide occurring in the commission of one of these crimes, whether unintended or accidental, is first degree murder.<sup>18</sup> But the facts in these cases do not show, nor the opinions indicate, that any of the homicides occurred while the accused was engaged in a particular part of the felony regarded as not dangerous to human life. The point seems never to have been raised in this state. It was not raised in *State v. Williams*,<sup>19</sup> in which the court held it not error to refuse to instruct, in a case of homicide in the commission of robbery, that the burden was upon the state

<sup>15</sup> *D* makes poisoned candy, which she gives to a stepchild. The child dies. The evidence indicates no strong motive. First degree, *aff'd*. *State v. Koontz*, 117 W. Va. 35, 183 S. E. 680 (1936).

There was evidence *D* conspired with *A* to kill *D*'s husband. No motive is proved. First degree, *aff'd*. *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385 (1891).

And see *State v. Lemon*, 84 W. Va. 25, 99 S. E. 263 (1919).

<sup>16</sup> *D* has a grudge against *X*. *D*, with *Y*, in a field, sees *X* riding by in a wagon. *D* steps behind a tree and shoots *X*. The evidence is insufficient to show a lying in wait, for which three things are necessary, *i. e.*, waiting, watching, and secrecy. First degree, *rev'd* for other reasons also. *State v. Abbott*, 8 W. Va. 741 (1875).

<sup>17</sup> See *State v. Abbott*, 8 W. Va. 741 (1875).

<sup>18</sup> *Dictum in Commonwealth v. McManus*, 282 Pa. 25, 127 Atl. 316 (1925).

<sup>19</sup> *State v. Williams*, 98 W. Va. 458, 127 S. E. 320 (1925).

to prove malice before a conviction of first or second degree murder could be had. Nor do the facts of that case squarely present a question of the scope of the statutory language, "in the commission of, or attempt to commit", though the court lays down the proposition, generally, that under the code provision which makes homicide in the commission of, or attempt to commit, a particular felony, such as robbery, murder in the first degree, the law will supply the necessary intent and malice in cases coming within the statute, and conviction may be had though no intent to kill is shown, or though it appears that there was no such intent, and that it is not necessary to show deliberation, wilfulness or premeditation. While the facts recited are meagre, the court indicates that the jury could have found that defendant killed deceased in the latter's shanty while committing robbery. Nor was either question raised in *State v. Beale*,<sup>20</sup> a case of homicide in the commission of rape. Courts have held variously on the point as to when escape ceases to be in the commission of robbery or burglary, and the effect of fleeing with or without loot. Both these, and the situation of an accidental homicide during a part of the felony not regarded as dangerous to life seem to be open questions in West Virginia.

There is another kind of first degree murder which includes all cases of "wilful, deliberate and premeditated killing."<sup>21</sup> In these cases there must be a homicide attended by malice aforethought, but in addition, a specific intent to kill, not necessary to common law murder, is required, and this is the element distinguishing this kind of first degree murder from murder of the second degree.<sup>22</sup> But, just as malice may be implied, so may wil-

<sup>20</sup> *State v. Beale*, 104 W. Va. 617, 141 S. E. 7 (1927).

<sup>21</sup> In this kind of case, proof must be adduced to satisfy the mind that death was the ultimate result which the concurring will, deliberation and premeditation sought. *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228 (1903).

Premeditation means thought of a matter before it is executed, and implies formation in the mind of a plan of destruction. *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228 (1903).

The act and specific intent combined include all the elements of first degree murder. *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434 (1902).

<sup>22</sup> *D* and *X* are drunk. *D* has a gun which he is taking to a repair shop. Without prior altercation, *D* shoots *X*. First degree, *rev'd* for a binding instruction which failed to consider drunkenness which might negative specific intent. *State v. Hertzog*, 55 W. Va. 74, 46 S. E. 792 (1904).

*D* and *X* have an argument. As *X* runs away, *D* shoots him in the back. First degree, *aff'd*. *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434 (1902).

See also *State v. Porter*, 98 W. Va. 390, 127 S. E. 386 (1925); *State v. Snider*, 81 W. Va. 522, 94 S. E. 981 (1918); *State v. Gravely*, 66 W. Va. 375, 66 S. E. 502 (1909); *State v. Briggs*, 58 W. Va. 291, 52 S. E. 218 (1905); *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228 (1903); *State v. Tucker*, 52 W. Va.

fulness, deliberation and premeditation, or intent to kill, be inferred in certain circumstances;<sup>23</sup> and the intent need not have existed for any particular length of time if present at the moment of the act.<sup>24</sup> Nor need it have been directed at the person actually killed.<sup>25</sup> While an early case<sup>26</sup> draws a distinction between deliberate and premeditated, a later case<sup>27</sup> suggests that the words are used synonymously and disapproves of the distinction. "Wilful" is said to denote the commission of an act "on purpose", and deliberate and premeditated to indicate reflection in the formation of an intent.<sup>28</sup>

All other murder, that is, outside the particular cases enumerated in the statute, and committed without deliberation and premeditation, is murder of the second degree. Malice is an essential element, but there is no specific intent to kill. An act done with intent, not to kill, but to do great bodily injury, will be second degree murder if death ensues,<sup>29</sup> provided the facts do not bring the case within the cases of first degree murder enumerated in the statute, or reduce it to voluntary manslaughter.

Numerous cases state or approve the broad proposition that where a homicide is proved, it is presumptively second degree mur-

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420, 44 S. E. 427 (1902); State v. Beatty, 51 W. Va. 232, 41 S. E. 434 (1902); State v. Sheppard, 49 W. Va. 582, 39 S. E. 676 (1901); State v. Morrison, 49 W. Va. 210, 38 S. E. 481 (1901); State v. Hobbs, 37 W. Va. 812, 17 S. E. 380 (1893); State v. Robinson, 20 W. Va. 713 (1882).

<sup>23</sup> Officers wait by road with warrant to arrest *D*. *D* walks by, they accost him, and *D* shoots *X* in attempting to escape. First degree, *aff'd*. State v. Hamrick, 112 W. Va. 157, 163 S. E. 868 (1932). State v. Saunders, 108 W. Va. 148, 150 S. E. 519 (1929) (see facts note 6, *supra*).

*D* quarrels with *X*, and cuts her throat. No extenuation appears. First degree, *aff'd*. State v. Tucker, 52 W. Va. 420, 44 S. E. 427 (1902).

<sup>24</sup> *D* is annoying *A. B.*, an officer, interferes. *D* shoots *B*. Instruction approved. Second degree, *aff'd*. State v. Clark, 64 W. Va. 625, 63 S. E. 402 (1908).

And see State v. Hamrick, 112 W. Va. 157, 163 S. E. 868 (1932); State v. Lemon, 84 W. Va. 25, 99 S. E. 263 (1919); State v. Abbott, 64 W. Va. 411, 62 S. E. 693 (1908); State v. Briggs; State v. Morrison, both *supra* n. 22; State v. Welch, 36 W. Va. 690, 15 S. E. 419 (1892).

<sup>25</sup> *D*, without provocation, fired at two persons and killed *X*. First degree, *aff'd*. State v. Briggs, 58 W. Va. 291, 52 S. E. 218 (1905). See also State v. Croston, 103 W. Va. 380, 137 S. E. 536 (1927); State v. Price, 92 W. Va. 542, 115 S. E. 393 (1922).

<sup>26</sup> State v. Dodds, 54 W. Va. 289, 46 S. E. 228 (1903).

<sup>27</sup> State v. Worley, 82 W. Va. 350, 96 S. E. 56 (1918). Not error to omit one of these words in an instruction.

<sup>28</sup> State v. Dodds, 54 W. Va. 289, 46 S. E. 228 (1903).

<sup>29</sup> *D* attacks *X* with a club, with intent to do severe injury, but without intent to kill. Second degree, *aff'd*. State v. Morrison, 49 W. Va. 210, 38 S. E. 481 (1901).

der, and the burden is upon the state to elevate it to first degree murder by showing the characteristics of that offense, and upon the defendant to reduce the offense to manslaughter by showing extenuating circumstances, or to justify or excuse the homicide by showing that he acted lawfully.<sup>30</sup> But this proposition is considerably qualified by other opinions. As previously indicated, the presumption arises from an implication of malice where a homicide is committed and no facts of extenuation appear. But the presumption seemingly does not arise, or is overcome and disappears in several situations. Malice is not implied where it appears that the killing was accidental,<sup>31</sup> though occasioned by a deadly weapon, and the burden is not upon defendant to show that the killing was accidental, but upon the state to show it was not.<sup>32</sup> Malice is not inferred from the result of the act alone, that is, the fact of death, else an accidental killing would be malicious.<sup>33</sup> The act itself, the manner, means, and circumstances must warrant the inference of malice.<sup>34</sup> In general, evidence of extenuating circumstances will rebut the presumption, and an instruction which states that, where a homicide is proved it is presumed to be murder in the second degree, is held to be improper unless the instruction calls attention to

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<sup>30</sup> *D* had *X* arrested and in helping serve the warrant, shot *X* without apparent provocation. Instruction not error. Second degree, *aff'd*. State v. Bailey, 103 W. Va. 605, 138 S. E. 202 (1927).

*D* objected to conduct of *X*. *X* made a provoking reply, and *D* shot *X*. Instruction approved. First degree, *aff'd*. State v. Abbott, 64 W. Va. 411, 62 S. E. 693 (1908).

See also State v. Frye, 98 W. Va. 504, 127 S. E. 332 (1925); State v. Wauldron, 71 W. Va. 1, 75 S. E. 558 (1912); State v. Gravely, 66 W. Va. 375, 66 S. E. 502 (1909); State v. Clark, 64 W. Va. 625, 63 S. E. 402 (1908); State v. Yoho, 64 W. Va. 250, 61 S. E. 367 (1908); State v. Dodds; State v. Tucker; State v. Morrison, all *supra* n. 22; State v. Staley, 45 W. Va. 792, 32 S. E. 193 (1899); State v. Hobbs, 37 W. Va. 812, 17 S. E. 380 (1893); State v. Welch, 36 W. Va. 690, 15 S. E. 419 (1892); State v. Douglass, 28 W. Va. 297 (1886); State v. Greer, 22 W. Va. 800 (1883); State v. Cain, 20 W. Va. 679 (1882); State v. Abbott, 8 W. Va. 741 (1875).

<sup>31</sup> *D* is playing with a revolver. As he attempts to put it in his pocket it is fired, killing his sister. Malice not implied from these facts. First degree, *rev'd*. State v. Cross, 42 W. Va. 253, 24 S. E. 996 (1896). See also State v. Tharp, 116 W. Va. 256, 180 S. E. 97 (1935).

<sup>32</sup> Where the circumstances are consistent with accidental shooting, error to instruct that the burden is on *D*. First degree, *rev'd*. State v. Cross, 42 W. Va. 253, 24 S. E. 996 (1896).

<sup>33</sup> *D*, a small man, struck *X*, a large man, a light blow in fun. *X* died in a short time from a clot on the brain. Second degree, *rev'd*. State v. Roush, 95 W. Va. 132, 120 S. E. 304 (1923).

<sup>34</sup> State v. Tharp, 116 W. Va. 256, 180 S. E. 97 (1935), (see facts note 5, *supra*). And see State v. Thornhill, 111 W. Va. 258, 161 S. E. 431 (1931).

any extenuating circumstances appearing in the evidence.<sup>35</sup> The presumption is rebutted where it appears that the killing was done in the heat of passion on sudden and strong provocation.<sup>36</sup> The presumption does not arise where the defendant is an infant less than fourteen years of age, because of a contrary rule that such an infant *prima facie* lacks capacity to commit the offense. The burden of showing extenuating circumstances is not imposed upon him.<sup>37</sup> *State v. Dodds*<sup>38</sup> suggests that the presumption arises from the statute. *State v. Sauls*<sup>39</sup> flatly contradicts the assertion. *State v. Gravely*<sup>40</sup> suggests that the presumption is one of law arising from the construction given the statute, and is applicable wherever a homicide is proved. Judge Poffenbarger, dissenting, defines the presumption, in effect, thus: At common law only malice was established by inference from the fact of killing, and not specific intent to kill which is the essential element of what our statute makes first degree murder. The statute, now dividing murder into two degrees, limits the operation of this common law presumption to second degree murder. A malicious killing is second degree murder. The additional element of specific intent must rest on additional evidence to enable the jury to find that fact. There being no degrees of murder at common law, the presumption of malice covered the whole field. It existed before the statute, and the statute stops it at murder in the second degree.

As to the further rule, also stated in numerous cases, that where one strikes a mortal blow with a deadly weapon on slight, or without any, provocation, he is presumed to have intended the necessary and immediate consequences of the act, and is *prima facie* guilty of a wilful, deliberate and premeditated killing.<sup>41</sup> Judge

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<sup>35</sup> *D* sees *X* coming to his home and waits until *X* and *D*'s wife are in a compromising situation. *D* shoots *X*. Instruction improper which does not refer to extenuating circumstances shown in evidence. Second degree, *rev'd*. *State v. Sauls*, 97 W. Va. 184, 124 S. E. 670 (1924).

*D* is riding a horse and fires a pistol at the ground. The horse jumps, the gun is discharged, and *X* is killed. Voluntary manslaughter, *rev'd*. *State v. Graham*, 94 W. Va. 67, 117 S. E. 699 (1923).

<sup>36</sup> *State v. Frye*, 98 W. Va. 504, 127 S. E. 332 (1925) (see facts note 5, *supra*).

<sup>37</sup> *State v. Vineyard*, 81 W. Va. 98, 93 S. E. 1034 (1917).

<sup>38</sup> *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228 (1903).

<sup>39</sup> *State v. Sauls*, 97 W. Va. 184, 124 S. E. 670 (1924).

<sup>40</sup> *State v. Gravely*, 66 W. Va. 375, 66 S. E. 502 (1909).

<sup>41</sup> *X* is fighting with a relative of *D*. *D* is called to the scene, pursues *X* on a mule and shoots *X*. Second degree, *aff'd*; *State v. Justice*, 107 W. Va. 490, 148 S. E. 843 (1929).

*D* assaults *X* with a club, and death ensues. Jury could find intent to kill.

Poffenbarger has to say that here also the real intent and purpose of the accused is established by inference, from the means, manner and circumstances. At common law these circumstances, he adds, made out a case of express malice. But likewise, this inference from the use of a deadly weapon is not permitted to operate where it appears that the killing was accidental.<sup>42</sup> It is rebutted where it appears that the killing was done in heat of passion, upon strong provocation.<sup>43</sup> It does not arise where the defendant is less than fourteen years old, since such an infant is presumptively *doli incapax*.<sup>44</sup> And in general, an instruction is held too abstract which permits inference of specific intent from the act of killing with a deadly weapon on slight or no provocation, unless the instruction calls attention to any extenuating circumstances appearing in the evidence of either the defendant or the state.<sup>45</sup>

While the language of the court frequently is confusing, the presumption of second degree murder is more like a true presumption which the law creates, requiring certain evidence to overcome it, and which disappears when such evidence is produced, but which, if no such evidence is produced, is treated as if it were a fact. *Prima facie* evidence does not disappear when rebutted. The inference of intent from the kind and the use of a deadly weapon on slight provocation is more like *prima facie* evidence than like a true presumption. A jury, obviously, can not be required to infer intent. It may do so where the facts warrant. But while it may be morally obligated to presume malice in proper cases, neither is there any effective method of compelling it to do so. The net result seems to be that, whether the rule is one of *prima facie* evi-

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First degree, *aff'd*. State v. Hedrick, 99 W. Va. 529, 130 S. E. 295 (1925).

See also State v. Legg, 59 W. Va. 315, 53 S. E. 545 (1906); State v. Staley; State v. Hobbs; State v. Welch; State v. Greer; State v. Cain, all *supra* n. 30.

<sup>42</sup> Instruction bad which does not consider possibility of accident. State v. Cross, 42 W. Va. 253, 24 S. E. 996 (1896) (see facts note 31, *supra*). And see State v. Legg, 59 W. Va. 315, 53 S. E. 545 (1906).

<sup>43</sup> State v. Coleman, 96 W. Va. 544, 123 S. E. 580 (1924), and cases cited in footnotes 36 and 52.

<sup>44</sup> State v. Vineyard, 81 W. Va. 98, 93 S. E. 1034 (1917).

<sup>45</sup> *D* and *X* had a fight. *X* went home, but came back and entered *D*'s gate. *D* warned *X* off, but *X* persisted. *D*, thinking *X* armed, shot and killed *X* as *X* advanced. Second degree, *rev'd* for an abstract instruction. State v. Garner, 97 W. Va. 222, 124 S. E. 681 (1924).

*X* used a vile epithet toward *D*. *D* grabbed a knife from *Y* and stabbed *X*. Instruction held bad, but first degree *rev'd* also on other grounds. State v. Coleman, 96 W. Va. 544, 123 S. E. 580 (1924).

See also State v. Whitt, 96 W. Va. 268, 122 S. E. 742 (1924); State v. Donahue, 79 W. Va. 260, 90 S. E. 834 (1916); State v. Hertzog, 55 W. Va. 74, 46 S. E. 792 (1904).

dence or of presumption, the jury may infer both malice and intent from the act and surrounding circumstances, or infer malice but not intent, or infer neither.

There are two degrees of manslaughter, voluntary, and involuntary. The former is a felony, the latter a misdemeanor.<sup>46</sup> Voluntary manslaughter is the unlawful killing of a human being by another, with intent to kill, or do great bodily harm, but in sudden passion aroused by gross provocation.<sup>47</sup> It is, obviously, an unreasoned killing, done in sudden anger; hence, says the court, without malice.<sup>48</sup> It is said that lack of malice distinguishes it from murder. There are other courts using similar language. It is arguable, however, that the true distinction is not absence of malice, but is one of degree of provocation. If the malice necessary to second degree murder is not negated by drunkenness, though drunkenness may negate the specific intent necessary to first degree murder, how is it that malice is negated by sudden passion when an intent to kill is present? True, sudden passion may suspend the reflective faculties, but so may drunkenness. But the argument is only one of definition, and does not change the result. As to the degree of provocation, it is said that mere words, however insulting, are never sufficient to reduce the offense to manslaughter.<sup>49</sup> It is suggested by dicta that some physical encounter is necessary,<sup>50</sup> but other cases suggest that the required provocation is not confined to instances of physical combat, but that other great provocation which precludes deliberation is sufficient.<sup>51</sup> The court

<sup>46</sup> W. VA. REV. CODE (Michie, 1937) c. 61, art. 2, §§ 4, 5.

<sup>47</sup> *D* and *X* engaged in a fight. *D* picked up a mattock and killed *X*. Voluntary manslaughter, *aff'd*. State v. Abbott, 103 W. Va. 191, 136 S. E. 861 (1927).

See also State v. Pusey, 188 S. E. 745 (W. Va. 1936); State v. Frye, 98 W. Va. 504, 127 S. E. 332 (1925); State v. Weisengoff, 85 W. Va. 271, 101 S. E. 450 (1919); State v. Crawford, 66 W. Va. 114, 66 S. E. 110 (1909); State v. Dickey, 48 W. Va. 325, 37 S. E. 695 (1900); State v. Hobbs, 37 W. Va. 812, 17 S. E. 380 (1893).

<sup>48</sup> State v. Crawford; State v. Hobbs, both *supra* n. 47.

<sup>49</sup> Hearing that *X* had been paying attentions to *D*'s wife, *D* armed himself, met *X* and in an argument, without blows, *D* shot *X*. Provocation not sufficient to reduce the offense to voluntary manslaughter. State v. Cline, 100 W. Va. 57, 130 S. E. 91 (1925).

*D*, in a poker game, has an argument with *X* over marked cards, and shoots *X*. Instruction properly refused which would tell the jury this was sufficient provocation. Second degree, *aff'd*. State v. Murphy, 89 W. Va. 413, 109 S. E. 771 (1921).

And see State v. Porter, 98 W. Va. 390, 127 S. E. 386 (1925); State v. Crawford, 66 W. Va. 114, 66 S. E. 110 (1909).

<sup>50</sup> Dicta in State v. Porter; and State v. Murphy, both *supra* n. 49

<sup>51</sup> State v. Cline, 100 W. Va. 57, 130 S. E. 91 (1925), suggesting by dictum

lays down the proposition that a sudden intentional killing, though with a deadly weapon, by one not previously at fault, in immediate resentment of a gross provocation, is *prima facie* a killing in heat of blood, and unless malice can be inferred from other circumstances, a finding of murder will be set aside.<sup>52</sup> These extenuating circumstances are said to rebut the presumption of malice.

Involuntary manslaughter is the unintentional killing of a human being by another, where the homicide proceeds from the commission of an unlawful act which is not of such a nature as to import malice,<sup>53</sup> or from the commission of a lawful act in an unlawful manner.<sup>54</sup> The unlawful act is not one tending naturally to produce death or great bodily harm. The unlawful doing of a lawful act consists of doing it without proper caution or requisite skill, unguardedly or undesignedly. The homicide is accidental where it occurs unintended in the lawful commission of a lawful act, under a reasonable belief that no harm will ensue. That the killing, in involuntary manslaughter, is unintended distinguishes the offense from voluntary manslaughter.<sup>55</sup> That it is without malice distinguishes it from murder.<sup>56</sup>

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that seeing one's spouse committing adultery may be sufficient provocation to reduce an intentional killing to voluntary manslaughter.

<sup>52</sup> *D* is struck on the head with a thrown rock coming from a group of striking workmen. *D* sees *X* about to throw a rock at *D*. *D*, a national guardsman, draws his revolver and kills *X*. Second degree, *rev'd*. *State v. Michael*, 74 W. Va. 613, 82 S. E. 611 (1914).

See also *State v. Cassim*; *State v. Galford*, both *supra* n. 5.

<sup>53</sup> Dicta in *State v. Weisengoff*; and *State v. Hobbs*, both *supra* n. 47.

<sup>54</sup> See *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450 (1919).

<sup>55</sup> *D* kills his wife in a fight over a letter she is writing to another man. Instruction properly refused which would require jury to find an intentional and wilful commission of an unlawful act to convict of voluntary or involuntary manslaughter. Voluntary manslaughter, *aff'd*. *State v. McHaffa*, 110 W. Va. 266, 157 S. E. 595 (1931). And see dictum in *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450 (1919).

<sup>56</sup> See cases cited in note 53, *supra*.