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Murder—Distinction Between First and Second Degree Inconsistency in Some West Virginia Cases

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Whether the actual conclusion reached in the principal case can be justified by an application of the Hearsay Rule is a question not within the purview of this note.

—FLETCHER W. MANN.

MURDER—DISTINCTION BETWEEN FIRST AND SECOND DEGREE—INCONSISTENCY IN SOME WEST VIRGINIA CASES.—Chapter 144, Section 1 of BARNES' WEST VIRGINIA CODE of 1923, says "Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate, and premeditated killing, * * * [and homicides in the commission of, or attempt to commit certain enumerated felonies, (see also chapter 148, sec. 13)] * * * is murder of the first degree. All other murder is of the second degree". This act is based on the Virginia Code of 1860, and the original statute was enacted much earlier than that. As these two degrees of murder are statutory and unknown to the common law, the first inquiry must be as to what constitutes murder at common law; and having found the answer, the next logical step is to exclude therefrom all that which the legislature has declared to be first degree murder, which leaves, because of the "all other" clause, a residue of second degree.

For the purposes of this note no attempt at an all inclusive classification of common law murder need be given, as it is sufficient to state that a killing accompanied by malice aforethought,—malice prepense,—is essential. This proposition is elementary and needs no authority to support it. Malice aforethought is either express or implied, and it is in regard to the implied malice that the difficulty arises. It is the former in cases where the accused has made threats or otherwise expressly shown malice, and the latter in cases where the surrounding circumstances are such that the killing can only be accounted for on the supposition of design or intent. Courts applying the rules of common law in cases involving no degrees of murder have laid down that when a homicide occurs in the commission of any felony, or in the resistance of a lawful arrest, the offense is murder even though the killing was unintentional, for there the malice prepense is implied by law. *Regina v. Horsey*, 3 Fost. & F. 287 (1862); *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *Boyd v. State*, 17 Ga. 194 (1855); *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651. It has also been held that malice aforethought may be implied when the act which causes the death is done "delib-

erately and with the intention of mischief",—such as conduct amounting to a reckless disregard of probable fatal consequences, *Ann v. State*, 11 Humph. (Tenn.) 159 (1850); and from the dangerous use of a deadly weapon, *Commonwealth v. Webster*, 5 Cush. (Mass.) 296, 52 Am. Dec. 711 (1850). The malice aforethought need not be of any definite duration in the mind of the culprit, and it has been held to be sufficient if the malice pre-pense arises almost simultaneously with the act. *State v. Anderson*, 2 Tenn. 6, 5 Am. Dec. 648; *State v. McDonnell*, 32 Vt. 491 at 544 (1860). But if the act is not done deliberately, as for instance, in the heat of passion on sufficient provocation, the offense is but manslaughter. "The question is whether the prisoner had determined to do so." *Rex v. Thomas*, 7 Car. & P. 817 (1837).

Therefore it would seem that in cases involving felony or resistance to lawful arrest, the instruction to the jury would be to the effect that if they find certain facts to be true the law implies malice aforethought, and the verdict must be murder; while in * * * deaths resulting from wanton and reckless conduct or dangerous weapons, if the jury finds that certain acts were deliberate, premeditated, and "in a spirit of mischief" the malice pre-pense will be implied and the crime is murder. If the jury does not so find, the offense would be manslaughter, if a crime at all. So it appears that at common law willfulness, deliberation, and premeditation, are necessary elements of murder (except in the felony and arrest cases); although a few border line cases suggest themselves, as where a workman throws lumber from the roof of a building in a populous town and inadvertantly kills a person in the street below. This is nevertheless murder because of the recklessness of the act, although there is no deliberation. 4 BLACKSTONE COMM. 192; *Whiteford v. Commonwealth*, 6 Rand. (Va.) 721, 18 Am. Dec. 771 (1828). But it is submitted that such a case will very seldom arise, for it seems reasonable to suppose that most workmen in such a predicament must realize the danger of such an act at the time, and if one does so realize and throws the lumber anyway it is a deliberate act, for he has decided to take the chance.

It is therefore submitted, first,—that under our statute second degree murder can consist of (1) a killing in the course of a felony not enumerated in section one, (2) a killing in the resistance of a lawful arrest (both of which might also be first degree murder, however), and (3) common law murder in a few possible but seldom arising cases of criminal negligence; and that

all other homicides must be first degree murder, or voluntary or involuntary manslaughter, if criminal at all.

The Supreme Court of Appeals of Virginia as early as 1828, in *Whiteford v. Commonwealth*, *supra*, seems to have so construed the statute, in laying down the rule that premeditation and deliberation may occur at any time before the act, however short such time, and that malice prepense may be inferred from the nature of the acts of the accused, thereby recognizing the common law view of murder. The *Whiteford* Case further states that such homicides "must" be first degree murder, for the crime would otherwise be manslaughter. Two illustrations of second degree murder were cited however, the first being the workman case already mentioned and the other being a case of a man shooting at a fowl and killing a person instead. But even this has been doubted by the Central Criminal Court, the very home of the common law, in *Regina v. Serne*, 16 Cox C. C. 311 (1887). Two more recent West Virginia cases, affirming convictions of first degree murder, are to the same effect as the *Whiteford* Case. *State v. Medley*, 66 W. Va. 216, 66 S. E. 358 (1909); *State v. Lemon*, 84 W. Va. 25, 99 S. E. 263. It seems clear that the early Virginia court in construing the statute must have felt that second degree murder could not include many kinds of cases, aside from felony and unlawful arrest homicides, and it is worthy of note that the two possible cases of second degree murder cited by the court were such that very seldom will arise. Had the learned judge contemplated that second degree murder could embrace a killing by means of the deliberate use of a deadly weapon he surely would have given such an illustration, for experience shows that more murders are committed in such a manner than by the criminal negligence in the two cases cited.

It is submitted, secondly,—that a number of our West Virginia cases holding that instructions should be given covering *both* degrees of murder as well as manslaughter are inconsistent with the *Whiteford* Case and with the statute, inasmuch as, from the facts they state, the homicides could be either first degree murder or manslaughter only, if not justifiable or excusable. For example, *State v. Shamblin*, 143 S. E. 230 (W. Va. 1928), also *State v. Banks*, 99 W. Va. 711, 129 S. E. 715, wherein a second degree instruction probably was given as that was the verdict. There are a number of such cases, all of which greatly extend the possible scope of second degree murder.

It is submitted, thirdly,—that these inconsistent cases are due to the rule of law in this state, laid down by the court, that all murder is presumed to be of the second degree, and that it rests

on the prosecution to raise the offense to first degree. See *State v. Trail*, 59 W. Va. 175, 53 S. E. 17; *State v. White*, 81 W. Va. 516, 94 S. E. 972. If it is true, as the writer contends, that second degree murder can embrace only a few classes of cases, then it is obvious that such a presumption is logically unsound. Suppose a case where the only evidence introduced tends to show a killing by poison or by starvation, how could the presumption be second degree when the express words of the statute are contra? Taking this just a step further, it is hard to see how a killing by the deliberate use of a dangerous weapon, for instance, could be presumed to be second degree either. The result of the presumption is that two homicides may be committed on the same day and in the same manner, and under exactly the same circumstances, but by two different persons. In one case the accused might be found guilty of first degree murder and sentenced to hang by the neck until dead, while in the other case the prisoner might be rewarded with a home at Moundsville for eighteen years as a guest of the state. It would all depend on the two juries, for the law would be the same in both cases. Now if accused number one was guilty of first degree murder, and it will be assumed that the evidence showed a clear case in both trials, why should the jury in case number two be told that accused number two might possibly be guilty of only second degree murder?

It is interesting to note that the presumption of second degree murder is of recent origin, compared with the age of the statute. This might be due to change in point of view since the enactment of section one. Texas has more recently reached by statute the same general result as our presumption, for in Texas there are no degrees of murder, but many definitions of what constitutes criminal homicide, with varying penalties affixed for the different classes, which are based on the manner in which the homicide was committed, extenuating circumstances, etc. PENAL CODE OF TEXAS, 1925, Articles 1201 thru 1264. In West Virginia the presumption enables the jury to be guided to some extent by their sense of justice in that they may return a verdict of first degree or second degree, depending on how they feel about the case. From a practical rather than logical viewpoint then, it might well be that the presumption is sound, for it is a strong argument to point out that a conviction of second degree murder is better than an acquittal when the jury feels that the accused is guilty, but balks at hanging or life imprisonment.

—J. G. HEARNE, JR.