



1946

Criminal Law--Presumption of Malice from Proof of the Homicide

Frank Selby Hurst
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Criminal Law Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Hurst, Frank Selby (1946) "Criminal Law--Presumption of Malice from Proof of the Homicide," *Kentucky Law Journal*: Vol. 34 : Iss. 4 , Article 7.

Available at: <https://uknowledge.uky.edu/klj/vol34/iss4/7>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

CRIMINAL LAW—PRESUMPTION OF MALICE FROM PROOF OF THE HOMICIDE

The rule that malice will be presumed once the accused has been proven to have committed the homicide is of uncertain origin, but it can be traced back at least as far as the seventeenth century, when Sir Matthew Hale wrote, "When one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious, and that he is *hostis humani generis* . . ."

This principle is adhered to in England in *Legg's Case*,² reported in the early part of the eighteenth century, and it is elaborated somewhat in Sir Michael Foster's work, where it is said:

"In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."³

The rule is also recognized by Blackstone,⁴ and is stated by Lord Tindal as being the law in a case decided in the first half of the nineteenth century.⁵

Thus the rule would appear to have been established as a part of the English law of homicide. However, in 1935, in a case in which it had been proved that the prisoner had shot his wife, the court, tracing the rule back to Foster, and saying that no previous authority existed for it, repudiates it on the ground that it is contrary to the principles of English common law.⁶ The court's rationalization of its position is as follows: "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. . . . If, at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."⁷

The earlier English view having been accepted as part of the English common law, it was recognized in this country, and

¹ HALE, PLEAS OF THE CROWN (1778) 455.

² Kelyng 27, 84 Eng. Rep. 1066 (1708).

³ FOSTER, CROWN LAW (2d ed. 1791) 255.

⁴ BLACKSTONE, COMMENTARIES (11th ed. 1790) 201.

⁵ Rex v. Greenacre and Gale, 8 Car. and P. 35, 173 Eng. Rep. 388 (1837).

⁶ Woolmington v. The Director of Public Prosecutions (1935) A. C. 462.

⁷ *Ibid.*, 481.

it has been applied quite frequently in homicide cases.⁸ In at least two states, Idaho⁹ and California,¹⁰ the presumption has been made a part of the criminal law by statute; and it appears that no court in this country has directly repudiated it as was done in the *Woolmington* case.¹¹ The question therefore arises as to whether or not the rule works such an injustice on one accused of murder that the courts of this country should follow the example set by the English court. The answer to the question undoubtedly can best be found by seeing the effect of the presumption as it is used by the courts.

It might be well to begin by pointing out that in none of the cases is the presumption sufficient for a conviction of murder in the first degree.¹² This is to be expected in consideration of the usual statutory requirement that there must be premeditation for first degree murder except in a few cases specified by the statute.¹³ Even so, a conviction of second degree murder is of sufficient gravity to warrant serious consideration of the possible injustice of the presumption.

Although the courts of California and Virginia still do lip service to the rule, the cases reveal that in actuality their position is quite close to, if not identical with, that of the English court at the present time. In California the presumption is statutory, and although that state originally required the defendant to overcome the presumption by a preponderance of evidence,¹⁴ a later case repudiated that position and said: "The well settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the act of killing, or the reason for or manner of its commission."¹⁵ Per-

⁸ *Wagner v. State*, 37 S. W. 2d 86 (Ark., 1931); *State v. Simborski*, 120 Conn. 724, 182 Atl. 221 (1936); *State v. Di Battista*, 110 Conn. 549, 148 Atl. 664 (1930); *Commonwealth v. Bedrosian*, 247 Mass. 573, 142 N. E. 778 (1924); *Brown v. State*, 62 N. J. L. 66, 42 Atl. 811 (1899); *Commonwealth v. Troup*, 302 Pa. 246, 153 Atl. 337 (1931). See, *State v. Zellers*, 7 N. J. L. 220 (1824); *Mercer v. Commonwealth*, 150 Va. 588, 142 S. E. 369 (1928); *Brown v. Commonwealth*, 138 Va. 807, 122 S. E. 421 (1924).

⁹ IDAHO CODE (1932) Sec. 19-2012.

¹⁰ CALIFORNIA PENAL CODE (Deering, 1937) Sec. 1105.

¹¹ *Woolmington v. The Director of Public Prosecutions* (1935) A. C. 462.

¹² *Wagner v. State*, 37 S. W. 2d 86 (Ark., 1931); *Commonwealth v. Bedrosian*, 247 Mass. 573, 142 N. E. 778 (1924); *Brown v. State*, 62 N. J. L. 66, 119 Atl. 324 (1899); *Commonwealth v. Troup*, 302 Pa. 246, 153 Atl. 337 (1931).

¹³ CALIFORNIA PENAL CODE (Deering, 1937) Sec. 189; GENERAL STATUTES OF CONNECTICUT (Revision of 1930) Sec. 6043; COMPILED LAWS OF MICHIGAN (1929) Sec. 16708; NEW YORK PENAL LAW (Thompson, 1939) Sec. 1044.

¹⁴ *People v. Hong Ah Duck*, 61 Cal. 387 (1882).

¹⁵ *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 129 (1889).

haps, therefore, in California as in England, if the prosecution proved that the defendant had killed a person, and proved nothing else, there could be no conviction of murder since there would certainly be a reasonable doubt as to the malice.

It also appears that the Virginia court, although it recognizes the rule, refuses to apply it in such a way as to give it any force. In the case of *Roark v. Commonwealth*,³⁶ the defendant struck the deceased such a blow as would not ordinarily have caused death, but the deceased, an old man in poor health, fell to the ground and struck his head, causing his death. The court, although it said that as a general rule malice is presumed from the killing, stated that the rule could not be applied in this case since death was not the natural and probable consequence of the defendant's act.

In the jurisdictions in which the rule is applied strictly, as it was formerly in England, the likelihood of its working a hardship on the defendant seems small indeed. It must be recognized that in almost every case in which the rule could be applied, the death was caused by the use of a deadly weapon, and thus the deadly weapon doctrine could properly be applied. In only one case does it seem that the application of the rule might have been unjust to the defendant.³⁷ In that case according to the defendant's testimony, the defendant's wife was trying to get a gun away from him, and in the struggle the gun went off, killing her. In this case, it seems possible to say that at the time of the accident the gun was not being used by the defendant as a deadly weapon, and that there should have been no presumption of malice. If this interpretation be correct, then in this case at least, the use of the presumption brought about an improper result.

The effect and significance of the rule at the present time may be summed up as follows: In England the rule clearly has been repudiated, and so long as there is a reasonable doubt as to the malice there can be no conviction of murder. In a few states in this country the rule, although recited by the courts, is, for all practical purposes, not applied by them. In the states in which the rule is effectively applied it seems that it would rarely work an injustice, since it is seldom applicable where the deadly weapon doctrine is not applicable. However, it would be desirable to do away with the presumption because of the possibility of improper results in a few cases such as the *Mangino* case,³⁸ and because, as is pointed out in the *Woolmington* case,³⁹ it is contrary to the rule of criminal law that the prosecution must prove the defendant's guilt.

FRANK SELBY HURST

³⁶ 182 Va. 244, 28 S. E. 2d 693 (1944).

³⁷ *State v. Mangino*, 156 Atl. 430 (New Jersey, 1931).

³⁸ *Ibid.*

³⁹ *Woolmington v. The Director of Public Prosecutions* (1935) A. C. 462.