

THE CODE OF ALABAMA

Recompiled

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Crimes and Offenses.

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CHAPTER 49.

HOMICIDE.

Art.

1. Murder, §§ 314-319.
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ARTICLE 1.

MURDER.

Sec.

314. Degrees of murder.
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§ 314. (4454) (7084) (4854) (3725) (4295) (3653) (111) **Degrees of murder.**—Every homicide, perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree.

I. NATURE AND ELEMENTS IN GENERAL.**II. INTENT OR DESIGN AND MALICE.****III. DEGREES.****A. First Degree.****B. Second Degree.****Cross References.**

For manslaughter, see §§ 320-323 of this title. For indictment, generally, see Tit. 15, §§ 227, et seq. For form of indictment, see Tit. 15, § 259, forms 80, 81, 82.

I. NATURE AND ELEMENTS IN GENERAL.

Editor's note.—It is not sought, in this note, to exhaust the cases dealing with murder, since to do so would be impossible in a work of this nature because of their number. However, it is the purpose of this note to give the rulings of the leading Alabama cases on the subject of murder, and to present the leading principles. For an exhaustive treatment on the subject of murder, the searcher must consult the digests.

Murder at common law.—Murder at common law was defined to be "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied."

Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Stephens v. State, 47 Ala. 696.

Murder in Alabama.—The instant section covers the whole field of murder, and clearly asserts that the crime, when attended with any of the enumerated circumstances, falls within the first degree, and every murder not attended with some of these enumerated circumstances, falls within the second degree. *Judge v. State*, 58 Ala. 406, 29 Am. Rep. 777.

The essential constituents of murder in the first degree when the homicide is not perpetrated under any of the particular circumstances enumerated in this section are that the taking of life must have been wilful, deliberate, malicious, and premeditated, which constituent elements must

concur and coexist or this offense is not committed. *Coats v. State*, 253 Ala. 290, 45 So. (2d) 35.

Are not presumed but must be inferred from circumstances—Although the elements of wilfulness, deliberation, malice and premeditation must exist to constitute murder in the first degree when the homicide does not occur under the conditions enumerated in this section, the law does not presume the concurrence and co-existence of these elements and witnesses cannot testify thereto, since their presence is to be inferred from all the circumstances of the particular case. *Coats v. State*, 253 Ala. 290, 45 So. (2d) 35.

Lying in wait means being in ambush.—According to *Bouvier*, "lying in wait" means "being in ambush for the purpose of murdering another." *Patterson v. State*, 191 Ala. 16, 17, 67 So. 997, Ann. Cas. 1916C, 968.

And is a question for the jury.—Where there is evidence that the defendant followed the deceased to a barber shop and waited outside, killing him when he came out, and also evidence of self-defense, it is a question for the jury to decide whether there was a lying in wait as denounced by this section. See *Hutchens v. State*, 207 Ala. 126, 92 So. 409.

Killing provoked by offensive words.—Mere words no matter how offensive can not reduce murder to manslaughter, but they can be such as to reduce the offense to second degree murder. *Ex parte Sloane*, 95 Ala. 22, 11 So. 14.

Killing wife found in act of adultery.—If a man finds his wife in the act of adultery, and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder, but of manslaughter only; if he does not strike and kill until after there has been time for his passion to cool and for reason to reassert itself, or if he strikes and kills immediately, but is not moved thereto by the heat of passion, he is guilty of murder. *Warren v. State*, 34 Ala. App. 447, 41 So. (2d) 201.

Averment of means.—The requirements of common law as to averments of means by which a homicide is committed has been retained under statutory procedure. *Wilson v. State*, 243 Ala. 1, 8 So. (2d) 422.

Conviction of lesser degrees of homicide.—On an indictment charging an offense under this section there may be a conviction of any of the lesser degrees of homicide. *Hunter v. State*, 156 Ala. 20, 47 So. 133; *Houlton v.*

State, 254 Ala. 1, 45 So. (2d) 7. See note to same case under § 316 of this title.

Evidence on sanity.—In prosecution for murder under this section, details of outrage committed on defendant's daughter, admitted under plea of not guilty by reason of insanity, were not competent on issue raised by plea of not guilty, but competent only as hearing on sanity of defendant at time of homicide. *Pippin v. State*, 23 Ala. App. 232, 123 So. 288.

Applied in Motes v. United States. 178 U. S. 458, 20 S. Ct. 993, 44 L. Ed. 1150; *Brown v. State*, 109 Ala. 70, 20 So. 103; *Ex Parte King*, 86 Ala. 620, 5 So. 863; *Lang v. State*, 84 Ala. 1, 4 So. 193, 5 Am. St. Rep. 324; *Redus v. State*, 243 Ala. 320, 9 So. (2d) 914; *Rainey v. State*, 245 Ala. 458, 17 So. (2d) 687; *Teague v. State*, 245 Ala. 339, 16 So. (2d) 877; *Munson v. State*, 250 Ala. 94, 33 So. (2d) 463.

Cited in Sanders v. State. 181 Ala. 35, 61 So. 336; *Harrison v. State*, 78 Ala. 5, 8; *Kilgore v. State*, 74 Ala. 1; *Washington v. State*, 60 Ala. 10, 16, 31 Am. Rep. 28; *Ex parte Nettles*, 58 Ala. 268, 275; *Levison v. State*, 54 Ala. 520, 523; *Murphy v. State*, 45 Ala. 32, 36; *Bridges v. State*, 225 Ala. 81, 142 So. 56; *King v. State*, 24 Ala. App. 267, 134 So. 133; *Houlton v. State*, 35 Ala. App. 444, 48 So. (2d) 11; *Kean v. State*, 38 Ala. App. 675, 92 So. (2d) 435.

Am. Jur. and ALR references.—26 Am. Jur., Homicide, §§ 11 et seq.; 37 et seq.

Homicide by companion of defendant while attempting to make escape from scene of crime as murder in first degree. 108 ALR 847.

Homicide by unlawful acts aimed at another. 18 ALR 917.

Time elapsing between wound and death as affecting homicide. 20 ALR 1006, 93 ALR 1470.

Wife's confession of adultery as affecting degree of homicide in killing her paramour. 10 ALR 470.

Homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law. 99 ALR 756.

Necessity of intent to kill to bring death resulting from arson within statute making homicide in perpetration of felony murder in first degree. 57 ALR 414.

Intoxication as affecting question of intent or malice. 79 ALR 899.

Mental deficiency not amounting to insanity as affecting question of premeditation and deliberation in murder case. 166 ALR 1194.

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR2d 210.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR2d 854.

Homicide: causing one, by threats or fright, to leap or fall to his death. 25 ALR2d 1186.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa. 37 ALR2d 1068.

Homicide by fright or shock. 47 ALR2d 1072.

II. INTENT OR DESIGN AND MALICE.

All elements must co-exist.—"Willful, deliberate, malicious, and premeditated killing" constitutes one species of murder in the first degree, under our statutory classification. To come within this class, all of these properties or qualifying adjectives must be found to have co-existed. *Mitchell v. State*, 60 Ala. 26. The absence of any one of them, unless necessarily implied in the facts proved and found to exist, would reduce murder to the second degree. *Ezell v. State*, 102 Ala. 101, 15 So. 810, 814.

"Deliberate" and "premeditated," as those words are used in this section, mean only this: if the slayer has any time to think before the act, however short such time may have been, even a single moment, and did think, and he struck the blow as the result of an intention to kill produced by this even momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing within the meaning of this section. *Daughdrill v. State*, 113 Ala. 7, 21 So. 378, 386.

As a general rule: an actual intent to kill is not essential. *Fowler v. State*, 161 Ala. 1, 49 So. 788; *Lewis v. State*, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75.

And a charge making it a prerequisite to conviction is properly refused.—On a prosecution for murder, a requested instruction that the defendant could not be convicted unless the jury believed beyond a reasonable doubt that he had a "formed and fixed design to kill" was properly refused. *Skipper v. State*, 144 Ala. 100, 42 So. 43.

An intent to kill is not a necessary element of murder in the second degree; it being sufficient if the accused voluntarily set in motion or applied an unlawful force, from which death

ensued, however free such action might have been from actual purpose to kill. *Smith v. State*, 154 Ala. 31, 45 So. 626; *Bob v. State*, 29 Ala. 20; *Titus v. State*, 117 Ala. 16, 23 So. 77.

That accused, while intoxicated, drove automobile at excessive speed, killing pedestrian on sidewalk, sustained second degree murder conviction, notwithstanding killing was unintentional. *Reed v. State*, 225 Ala. 219, 142 So. 442.

And when made so in charge such charge is misleading.—An intent to kill is not necessarily an ingredient of murder in the second degree, and charges hypothesizing such intent as necessary to conviction for that degree of murder are misleading. *Fowler v. State*, 155 Ala. 21, 45 So. 913.

Malice in law does not necessarily mean hate or ill will, but is defined as any unlawful act willfully done, without just cause or legal excuse. It is that mental state or condition which prompts the doing of an unlawful act without legal justification, excuse, or extenuation. *Patterson v. State*, 156 Ala. 62, 68, 47 So. 52; *Boulden v. State*, 102 Ala. 78, 86, 15 So. 341; *McGuffin v. State*, 178 Ala. 40, 59 So. 635, 636; *Patterson v. State*, 146 Ala. 39, 41 So. 157, 159; *Coates v. State*, 1 Ala. App. 35, 56 So. 6, 8.

It must exist to constitute murder.—In order for a homicide to be murder it must have been committed with malice aforethought. *Roberson v. State*, 183 Ala. 43, 62 So. 537; *Andrews v. State*, 159 Ala. 14, 48 So. 858; *Coates v. State*, 1 Ala. App. 35, 56 So. 6.

And should be given in charge.—In the trial of a defendant for homicide, it is error to refuse to instruct that there can be no conviction of murder in either degree unless the killing was malicious. *Compton v. State*, 110 Ala. 24, 26 So. 119. See also, *Untreiner v. State*, 146 Ala. 26, 41 So. 285.

Universal malice.—Judge Stone in *Mitchell v. State*, 60 Ala. 26, defines "universal malice" as that "depravity of the human heart, which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim." *State v. Massey*, 20 Ala. App. 56, 58, 100 So. 625.

In homicide prosecution, instruction that if the shooting was an act greatly dangerous to the lives of persons present and evidencing a de-

