

be murder in the second degree here; or to state the case more clearly, what is murder in the second degree in those states may be here only manslaughter, or justifiable or excusable homicide. Amidst this confusion, one thing is certain, murder in the first degree—capital murder—can't be made out of malice implied. Nothing but express malice proved as a fact, and so found by the jury, can make capital murder in this state. I do not now comprehend in this proposition a class of murder in the first degree made so and elevated to that degree by reason of being committed in the attempt to perpetrate a felony. That class stands by itself on independent ground; but it is certain, that of all other murders in this state, to constitute them capital, the element of express malice must appear in proof, and be found as a fact by the jury. We have no murder in this state which was not murder at the common law. In England, by the common law, no grades pertained to murder. The only line run through criminal homicide was that which divided murder from manslaughter; and all murder there was hanging or quartering murder. The code was a bloody code—too bloody for our people; and we changed the system at the call of reason and humanity. All murders are not alike in turpitude, tried by any moral test. If you, sir (speaking to a juror), are lying on a bed of sickness and prompted by an old grudge, masked in the disguise of sympathy, I approach you, proffer my assistance, gain your confidence, tender you medicine, five grains of arsenic (which I have substituted for twenty grains of calomel, the prescription of your physician), and you take it from my friendly hand, am I not, in the sight of heaven and earth, a different criminal from the man who, in the flush and transport of passion kills for bitter, burning words of contumely, spoken against the honor of his wife or daughter? Yet, by the common law, both of these supposed homicides are murder, and both capital. By our law it is otherwise. We do not live under a system which confounds distinctions, dictated as well by the enlightened reason, as by the instincts of man. We have divided murder into two degrees, and manslaughter four—adopting different penalties to each