

can't send him to the gallows upon it. It is a libel on our nature to presume without knowledge that every killing is with malice. Although man is capable of cold-blooded assassination, yet naturally he recoils from the deed; and for one murder done in cold blood, there are a hundred killings the result of misfortune, or great provocation, giving rise to sudden passion, or the instinct of self-preservation. If any presumption must be made by the law, the presumption should be more in harmony with reason and experience. But why presume at all; why not probe every case by its circumstances, many or few, subject to the inferences of fact, which is the very province of a jury to determine. In the essence of the thing, it is an invasion of the function of a jury, and must be either useless or hurtful. If the presumption of the law is a reasonable and natural inference from the facts proved, the jury are better able to draw it, because they are supposed to be better judges of the motives of human conduct than the courts; but if, on the other hand, the presumption of the law is arbitrary, technical, artificial, for that reason it should not be drawn at all. It is cruel, as well as unwise, to make such presumptions. Call them truth, and by them determine the destiny of a human being. The invasion is, however, a successful one. Malice implied by the law has a legal existence in our law of homicide. The courts "proclaim it;" but they also proclaim you shan't hang a man upon it.

Two decisions—18 Mo. State v. Jennings, and 18 Mo. State v. Dunn—reverse what is sometimes supposed to be the decisions of the same court in the fifth volume Mo. Reports State v. Bower, and adopt the doctrine maintained by the dissenting judge in that case. Under those decisions, to make murder in the first degree, express malice must be proved, and found by the jury as a fact. It is not a thing, the existence of which is guessed at by the law; it is a thing proved—proved by the evidence which you hear; a thing found by you as jurors. The Court may tell you what the thing is, but the Court cannot find it. You are the only tribunal that can determine whether it is a thing proved—proved to your satisfaction. Your consciences are involved, and you can't shift