

any arson, rape, robbery, burglary or other felony. In the first and second class express malice is essential, and forms a necessary ingredient in the offense, while in the third class it is not supposed to exist. If A breaks into the store of B at night with no other intent than to appropriate to himself the goods of B, and B enters and discovers him in the act, and attempts to do him bodily harm, and A to protect himself kills B, this is murder in the first degree because it is committed in an attempt to perpetrate a felony. Now this cannot be said to be a killing with deliberation, premeditation and malice aforethought, for the intent to kill was only formed when it became necessary to his personal safety, yet because it occurred while the party was attempting to perpetrate a felony, the law places it in the first degree, and makes it a capital offense.

In this case the theory of the State is that Worrell killed Gordon and then took and carried away the property, and not that he attempted first to take his property, and in the attempt a scuffle ensued which resulted in the death of Gordon. The fact that Worrell was afterwards found in the possession of the property is a fact introduced for the purpose of showing the intent with which the act was committed; the motive that led to it. It is an important link in the chain of evidence to establish malice.

The third ground taken by defendant's counsel is "That there is no evidence of express malice, which is essential to constitute murder in the first degree."

This point has been much labored by the learned counsel and the manner in which he has presented it evinces to my mind his entire want of confidence in the success of his defense, for I apprehend it would puzzle the ingenuity of the gentleman himself to imagine a case in which malice plays so prominent a part as it does in this. View it in any stage or aspect, and the eye must be dull indeed that cannot see the motive that prompted the crime; but as the counsel has made the point with apparent seriousness, I will meet it in a proper spirit.

Malice is a comprehensive word, susceptible of different