

Chapter XV

Crimes Against Public Order and Morals

Chapter Overview:

Some activities are criminalized due to their tendency to disturb the peace, create public nuisance, or threaten a sense of public morality. These crimes include disorderly conduct, rioting, public indecency, vagrancy and loitering, gang activity, prostitution and solicitation, obscenity, and cruelty to animals.

The crime of disorderly conduct punishes the disturbance of peace, public morals, or public decency. Disorderly conduct statutes vary from state to state in what types of activity are considered criminal, but they can each be traced back to a common law goal of punishing a breach of peace. When disorderly conduct is carried out by a group of individuals for the purposes of committing an additional crime, this is known as rioting.

Public indecency is a crime viewed to diminish the quality of life in the area surrounding the crime. The goal of statutes prohibiting such behavior is to maintain or improve the quality of life for the people inhabiting that area. Publicly indecent behavior might include such acts as would cause the deterioration of the physical appearance of a neighborhood, or behavior which would encourage an increase in undesirable societal elements in a given area and in turn affect such things as decrease in property values.

Vagrancy is a crime that punishes an individual for wandering in the streets without any apparent means of making a living to support themselves. Often considered in conjunction with this crime is loitering, which is the act of standing in a public place without any apparent purpose. While some legislation against loitering is aimed at people similar to vagrants and the homeless, authorities also have an interest in punishing loitering to aid in the control of gang activity, which plagues many areas of the country and poses a unique challenge to law enforcement.

Prostitution is the engagement in sexual activity in exchange for monetary or other property gain. To solicit prostitution by making a request that an individual commit the act is also considered a criminal offense. Prostitution is generally punished as a misdemeanor, except in cases where the offender has a history of multiple offenses or knowingly engages in prostitution while infected with HIV.

Obscenity is a form of speech that is not protected by the First Amendment's free speech clause, as it is viewed by the Supreme Court to be without redeeming social value. What constitutes obscenity varies from state to state but will include things such as child pornography.

Also included in the category of crimes against public order and morals is animal cruelty. While the reasoning behind the punishment of animal cruelty has changed over time it continues to be criminalized. In this chapter of the supplement you will see how Florida statutes criminalize animal cruelty, as well as the other crimes against public order and morals discussed here.

I. Disorderly Conduct

Section Introduction: An individual engaged in disorderly conduct when they commit such acts to cause a breach of peace and quiet, public morals, or sense of public decency. This crime is defined more specifically by the Virginia statute below, which is followed by reference to a criminal case (Supra, Chapter 5) applying the concept of disorderly conduct and its potential relation to other crimes.

Virginia Code § 18.2-415. Disorderly conduct in public places.

A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

A. In any street, highway, public building, or while in or on a public conveyance, or public place engages in conduct having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed; or

B. Willfully or being intoxicated, whether willfully or not, and whether such intoxication results from self-administered alcohol or other drug of whatever nature, disrupts any funeral, memorial service, or meeting of the governing body of any political subdivision of this Commonwealth or a division or agency thereof, or of any school, literary society or place of religious worship, if the disruption (i) prevents or interferes with the orderly conduct of the funeral, memorial service, or meeting or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed; or

C. Willfully or while intoxicated, whether willfully or not, and whether such intoxication results from self-administered alcohol or other drug of whatever nature, disrupts the operation of any school or any activity conducted or sponsored by any school, if the disruption (i) prevents or interferes with the orderly conduct of the operation or activity or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed.

However, the conduct prohibited under subdivision A, B or C of this section shall not be deemed to include the utterance or display of any words or to include conduct otherwise made punishable under this title.

The person in charge of any such building, place, conveyance, meeting, operation or activity may eject therefrom any person who violates any provision of this section, with the aid, if necessary, of any persons who may be called upon for such purpose.

The governing bodies of counties, cities and towns are authorized to adopt ordinances prohibiting and punishing the acts and conduct prohibited by this section, provided that the punishment fixed therefor shall not exceed that prescribed for a Class 1 misdemeanor. A person violating any provision of this section shall be guilty of a Class 1 misdemeanor.

See *Battle v. Commonwealth*, 50 Va.App. 135, 647 S.E.2d 499 (2007) – Supra, chapter 5.

II. Rioting

Section Introduction: When disorderly conduct is carried out by a group of individuals for the purpose of committing an illegal act, they are guilty of the crime of rioting. This section includes the Virginia statute.

Virginia Code § 18.2-405. What constitutes a riot; punishment.

Any unlawful use, by three or more persons acting together, of force or violence which seriously jeopardizes the public safety, peace or order is riot.

Every person convicted of participating in any riot shall be guilty of a Class 1 misdemeanor. If such person carried, at the time of such riot, any firearm or other deadly or dangerous weapon, he shall be guilty of a Class 5 felony.

Virginia Code § 18.2-407. Remaining at place of riot or unlawful assembly after warning to disperse.

Every person, except the owner or lessee of the premises, his family and nonrioting guests, and public officers and persons assisting them, who remains at the place of any riot or unlawful assembly after having been lawfully warned to disperse, shall be guilty of a Class 3 misdemeanor.

Virginia Code § 18.2-408. Conspiracy; incitement, etc., to riot.

Any person who conspires with others to cause or produce a riot, or directs, incites, or solicits other persons who participate in a riot to acts of force or violence, shall be guilty of a Class 5 felony.

Virginia Code § 18.2-411. Dispersal of unlawful or riotous assemblies; duties of officers.

When any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the police officials of the county, city or town, and any assigned militia, or any of them, shall go among the persons assembled or as near to them as safety will permit and command them in the name of the Commonwealth immediately to disperse. If upon such command the persons unlawfully assembled do not disperse immediately, such sheriff, officer or militia may use such force as is reasonably necessary to disperse them and to arrest those who fail or refuse to disperse. To accomplish this end, the sheriff or other law-enforcement officer may request and use the assistance and services of private citizens. Every endeavor shall be used, both by such sheriff or other officers and by the officer commanding any other force, which can be made consistently with the preservation of life, to induce or force those unlawfully assembled to disperse before an attack is made upon those unlawfully assembled by which their lives may be endangered.

III. Public Indecency

Section Introduction: Crimes of public indecency are also referred to as crimes against quality of life. Laws against such actions are concerned with maintaining the quality of life in the area

surrounding the location of the crime. The Virginia statute relevant to the idea of public indecency is listed below.

Virginia Code § 18.2-388. Profane swearing and intoxication in public; penalty; transportation of public inebriates to detoxification center.

If any person profanely curses or swears or is intoxicated in public, whether such intoxication results from alcohol, narcotic drug or other intoxicant or drug of whatever nature, he shall be deemed guilty of a Class 4 misdemeanor. In any area in which there is located a court-approved detoxification center a law-enforcement officer may authorize the transportation, by police or otherwise, of public inebriates to such detoxification center in lieu of arrest; however, no person shall be involuntarily detained in such center.

IV. Gangs

Section Introduction: The presence of gangs poses a particular challenge to the maintenance of law and order. Gang activity is present in virtually all areas of the country. In response, legislation is passed to specifically address the problems of gangs. Below are Virginia statutes that are aimed at the control of gang activity.

Virginia Code § 18.2-46.2. Prohibited criminal street gang participation; penalty.

A. Any person who actively participates in or is a member of a criminal street gang and who knowingly and willfully participates in any predicate criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang shall be guilty of a Class 5 felony. However, if such participant in or member of a criminal street gang is age eighteen years or older and knows or has reason to know that such criminal street gang also includes a juvenile member or participant, he shall be guilty of a Class 4 felony.

B. Violation of this section shall constitute a separate and distinct offense. If the acts or activities violating this section also violate another provision of law, a prosecution under this section shall not prohibit or bar any prosecution or proceeding under such other provision or the imposition of any penalties provided for thereby.

Virginia Code § 18.2-46.3. Recruitment of persons for criminal street gang; penalty.

A. Any person who solicits, invites, recruits, encourages or otherwise causes or attempts to cause another to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 1 misdemeanor. Any person age 18 years or older who solicits, invites, recruits, encourages or otherwise causes or attempts to cause a juvenile to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 6 felony.

B. Any person who, in order to encourage an individual (a) to join a criminal street gang, (b) to remain as a participant in or a member of a criminal street gang, or (c) to submit to a demand made by a criminal street gang to commit a felony violation of this title, (i) uses force against the individual or a member of his family or household or (ii) threatens force against the individual or a member of his family or household, which threat would place any person in reasonable

apprehension of death or bodily injury, is guilty of a Class 6 felony. The definition of "family or household member" set forth in § 16.1-228 applies to this section.

Virginia Code § 18.2-46.3:1. Third or subsequent conviction of criminal street gang crimes.

Upon a felony conviction of § 18.2-46.2 or § 18.2-46.3, where it is alleged in the warrant, information or indictment on which a person is convicted that (i) such person has been previously convicted twice under any combination of § 18.2-46.2 or § 18.2-46.3, within 10 years of the third or subsequent offense, and (ii) each such offense occurred on different dates, such person is guilty of a Class 3 felony.

Virginia Code § 18.2-46.3:2. Forfeiture.

All property, both personal and real, of any kind or character used in substantial connection with, intended for use in the course of, derived from, traceable to, or realized through, including any profit or interest derived from, any conduct in violation of any provision of this article is subject to civil forfeiture to the Commonwealth. Further, all property, both personal and real, of any kind or character used or intended to be used in substantial connection with, during the course of, derived from, traceable to, or realized through, including any profit or interest derived from, criminal street gang member recruitment as prohibited under § 18.2-46.3 is subject to civil forfeiture to the Commonwealth. The forfeiture proceeding shall utilize the provisions of Chapter 22.1 (§ 19.2-386.1 et seq.) of Title 19.2 and the procedures specified therein shall apply, mutatis mutandis, to all forfeitures under this article. The application of one civil remedy under the article does not preclude the application of any other remedy, civil or criminal, under this article or any other provision of the Code.

Virginia Code § 18.2-46.3:3. Enhanced punishment for gang activity taking place in a school zone; penalties.

Any person who violates § 18.2-46.2 (i) upon the property, including buildings and grounds, of any public or private elementary, secondary, or postsecondary school, or any public or private two-year or four-year institution of higher education; (ii) upon public property or any property open to public use within 1,000 feet of such school property; or (iii) on any school bus as defined in § 46.2-100 is guilty of a felony punishable as specified in § 18.2-46.2, and shall be sentenced to a mandatory minimum term of imprisonment of two years. A person who violates subsection A of § 18.2-46.3 upon any property listed in this section is guilty of a Class 6 felony, except that any person 18 years of age or older who violates subsection A of § 18.2-46.3 upon any property listed in this section, when such offense is committed against a juvenile, is guilty of a Class 5 felony. Any person who violates subsection B of § 18.2-46.3 upon any property listed in this section is guilty of a Class 5 felony. It is a violation of this section if the person violated § 18.2-46.2 or 18.2-46.3 on the property described in clauses (i) through (iii) regardless of where the person intended to commit such violation.

V. Prostitution & Solicitation

Section Introduction: Prostitution is the crime of engaging in sexual acts for the procurement of money or other valuable property. Solicitation of prostitution, carried out by a request that another person engage in prostitution, is also a crime. In Virginia these crimes are in violation of

various state statutes, such as those listed below. Individuals found to be guilty of violating one or more of these statutes can be subject to criminal prosecution.

Virginia Code § 18.2-346. Being a prostitute or prostitution.

A. Any person who, for money or its equivalent, commits adultery, fornication or any act in violation of § 18.2-361, or offers to commit adultery, fornication or any act in violation of § 18.2-361 and thereafter does any substantial act in furtherance thereof, shall be guilty of being a prostitute, or prostitution, which shall be punishable as a Class 1 misdemeanor.

B. Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts as enumerated above and thereafter does any substantial act in furtherance thereof shall be guilty of solicitation of prostitution and shall be guilty of a Class 1 misdemeanor.

Virginia Code § 18.2-347. Keeping, residing in or frequenting a bawdy place; "bawdy place" defined.

It shall be unlawful for any person to keep any bawdy place, or to reside in or at or visit, for immoral purposes, any such bawdy place. Each and every day such bawdy place shall be kept, resided in or visited, shall constitute a separate offense. In a prosecution under this section the general reputation of the place may be proved.

As used in this Code, "bawdy place" shall mean any place within or without any building or structure which is used or is to be used for lewdness, assignation or prostitution.

Virginia Code § 18.2-348. Aiding prostitution or illicit sexual intercourse.

It shall be unlawful for any person or any officer, employee or agent of any firm, association or corporation, with knowledge of, or good reason to believe, the immoral purpose of such visit, to take or transport or assist in taking or transporting, or offer to take or transport on foot or in any way, any person to a place, whether within or without any building or structure, used or to be used for the purpose of lewdness, assignation or prostitution within this Commonwealth; or procure or assist in procuring for the purpose of illicit sexual intercourse, or any act violative of § 18.2-361, or to give any information or direction to any person with intent to enable such person to commit an act of prostitution.

Virginia Code § 18.2-349. Using vehicles to promote prostitution or unlawful sexual intercourse.

It shall be unlawful for any owner or chauffeur of any vehicle, with knowledge or reason to believe the same is to be used for such purpose, to use the same or to allow the same to be used for the purpose of prostitution or unlawful sexual intercourse, or to aid or promote such prostitution or unlawful sexual intercourse by the use of any such vehicle.

Virginia Code § 18.2-355. Taking, detaining, etc., person for prostitution, etc., or consenting thereto.

Any person who:

(1) For purposes of prostitution or unlawful sexual intercourse, takes any person into, or persuades, encourages or causes any person to enter, a bawdy place, or takes or causes such person to be taken to any place against his or her will for such purposes; or,

(2) Takes or detains a person against his or her will with the intent to compel such person, by force, threats, persuasions, menace or duress, to marry him or her or to marry any other person, or to be defiled; or,

(3) Being parent, guardian, legal custodian or one standing in loco parentis of a person, consents to such person being taken or detained by any person for the purpose of prostitution or unlawful sexual intercourse; is guilty of pandering, and shall be guilty of a Class 4 felony.

Virginia Code § 18.2-356. Receiving money for procuring person.

Any person who shall receive any money or other valuable thing for or on account of procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse or any act in violation of § 18.2-361 shall be guilty of a Class 4 felony.

Virginia Code § 18.2-357. Receiving money from earnings of male or female prostitute.

Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, punishable as a Class 4 felony.

VI. Obscenity

Section Introduction: According to the U.S. Supreme Court, obscene material lacks redeeming social value and is therefore not protected by the First Amendment. The following statutes demonstrate how obscenity is viewed in the Commonwealth of Virginia.

Virginia Code § 18.2-372. "Obscene" defined.

The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Virginia Code § 18.2-373. Obscene items enumerated.

Obscene items shall include:

(1) Any obscene book;

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, bumper sticker, drawing, photograph, film, negative, slide, motion picture, videotape recording;

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds; or

(4) Any obscene writing, picture or similar visual representation, or sound recording, stored in an electronic or other medium retrievable in a perceivable form.

Virginia Code § 18.2-374. Production, publication, sale, possession, etc., of obscene items.

It shall be unlawful for any person knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport in intrastate commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item.

Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.

Virginia Code § 18.2-375. Obscene exhibitions and performances.

It shall be unlawful for any person knowingly to:

(1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre other than receiving salary and wages; or

(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place.

Virginia Code § 18.2-387.1. Obscene sexual display; penalty.

Any person who, while in any public place where others are present, intending that he be seen by others, intentionally and obscenely as defined in § 18.2-372, engages in actual or explicitly simulated acts of masturbation, is guilty of a Class 1 misdemeanor.

VII. Cruelty to Animals

Section Introduction: Cruelty to animals is classified as a crime against public order and decency. It is prohibited by the following Virginia statutes and illuminated by the case that follows.

Virginia Code § 18.2-403.1. Offenses involving animals - Class 1 misdemeanors.

The following unlawful acts and offenses against animals shall constitute and be punished as a Class 1 misdemeanor:

1. Violation of subsection A of § 3.1-796.122 pertaining to cruelty to animals, except as provided for second or subsequent violations in that section.
2. Violation of § 3.1-796.69 pertaining to transporting animals under certain conditions.
3. Making a false claim or receiving money on a false claim under § 3.1-796.118 pertaining to compensation for livestock and poultry killed by dogs.
4. Violation of § 3.1-796.83:1 pertaining to boarding establishments and groomers as defined in § 3.1-796.68.

Virginia Code § 18.2-403.2. Offenses involving animals - Class 3 misdemeanors.

The following unlawful acts and offenses against animals shall constitute and be punished as a Class 3 misdemeanor:

1. Violation of § 3.1-796.71 pertaining to the failure of a shopkeeper or pet dealer to provide adequate care to animals.
2. Violation of § 3.1-796.72 pertaining to the misrepresentation of an animal's condition by the shopkeeper or pet dealer.
3. Violation of § 3.1-796.73 pertaining to the abandonment of animals.
4. Violation of § 3.1-796.70 pertaining to the sale of baby fowl.
5. Violation of § 3.1-796.125 pertaining to fighting cocks, dogs and other animals.
6. Violation of clause (iii) of subsection A of § 3.1-796.122 pertaining to soring horses.
7. Violation of § 3.1-796.83:2 pertaining to notice of consumer remedies required to be supplied by boarding establishments.

Virginia Code § 18.2-403.3. Offenses involving animals - Class 4 misdemeanors.

The following unlawful acts and offenses against animals shall constitute and be punished as a Class 4 misdemeanor:

1. Violation of § 3.1-796.111 pertaining to interference of agents charged with preventing cruelty to animals.
2. Violation of § 3.1-796.126 pertaining to shooting pigeons.
3. Violation of § 3.1-796.121 pertaining to disposing of the body of a dead companion animal.
4. Violation of ordinances passed pursuant to §§ 3.1-796.98 and 3.1-796.100 pertaining to rabid dogs and preventing the spread of rabies and the running at large of vicious dogs.
5. Violation of an ordinance passed pursuant to § 3.1-796.95 requiring dogs to be on a leash.
6. Failure by any person to secure and exhibit the permits required by § 29.1-422 pertaining to field trails, night trails and foxhounds.
7. Diseased dogs. - For the owner of any dog with a contagious or infectious disease to permit such dog to stray from his premises if such disease is known to the owner.
8. License application. - For any person to make a false statement in order to secure a dog or cat license to which he is not entitled.
9. License tax. - For any dog or cat owner to fail to pay any license tax required by § 3.1-796.88 before February 1 for the year in which it is due. In addition, the court may order confiscation and the proper disposition of the dog or cat.
10. Concealing a dog or cat. - For any person to conceal or harbor any dog or cat on which any required license tax has not been paid.
11. Removing collar and tag. - For any person, except the owner or custodian, to remove a legally acquired license tag from a dog or cat without the permission of the owner or custodian.
12. Violation of § 3.1-796.68 pertaining to care of animals by owner.

Virginia Code § 18.2-403.4. Unauthorized release of animals; penalty.

Any person who intentionally releases an animal, as defined in § 3.1-796.66, lawfully confined for scientific, research, commercial, agricultural or educational purposes without the consent of the owner or custodian of the animal and with the intent to impede or obstruct any such lawful purpose shall be guilty of a Class 1 misdemeanor.

Winckler v. Commonwealth, 155 Va. 1146, 156 S.E. 364 (1931).

Procedural History: The accused was tried and convicted in the Circuit Court of Mecklenburg County, Va., on April 24, 1930, of unlawfully wounding, cutting, etc., a cow belonging to C.H. and W. B. Gordon, with the intent to injure and kill the said cow. His punishment was fixed by the verdict of the jury at ninety days confinement in jail and a fine of one hundred dollars.

Issue(s): Was the testimony of the Commonwealth, giving it all the probative value to which it was entitled, wholly insufficient to sustain the verdict of guilty?

Facts: The facts as shown by the evidence are these: The accused was a tenant on the farm of S. N. Hutcheson in Mecklenburg County. This farm adjoined that of C. S. Gordon and his sons, C. H. and W. B. Gordon. On March 24, 1930, accused, accompanied by his wife, went from their home to their tobacco plant bed for the purpose of doing some necessary work. The accused took with him an axe, a hammer, and a bucket of nails. After being there for some time he left his wife at the plant bed and returned home to take his tools. Some distance from his home he heard some cattle lowing and bellowing and he hurried, for he remembered that he had left his cow tied at the front door of his stable. When he reached the place he found the cow down on the ground and entangled in the chain with which she was tied. There were two bulls and eight cows on the scene, some of which were goring and trampling his cow. He stooped to unloose the cow, and, while so engaged, one of the Gordon cows attacked or charged him or his cow, but he threw himself against the wall of the stable in time to avoid being injured. The Gordon cow turned and attacked him or his cow again, when he kicked at her 'and threw up his axe which struck her on the side or back.' The cow ran off a few steps and fell to the ground. She had a cut or wound near the backbone of considerable size from which she died on the afternoon of the day of the occurrence. It was also in evidence that the Gordon cow had had a calf four days before the injury.

The accused at once sent for the owners of the injured cow and went himself to the home of his landlord to ask that a veterinarian be sent for. One of the owners, Mr. C. H. Gordon, came and the accused explained the occurrence to him and expressed his sorrow at the result. He stated that he had no ill will for the Gordons and was not angry with the cow but struck at her to defend himself, or his cow, as he thought that he was in danger of being hurt.

Holding: *Reversed.*

Opinion: BROWNING, Justice.

The instruction given by the court at the request of the Commonwealth was objected to by the accused on the ground that unlawful intent is an element of the offense charged and such intent must be proven to sustain a conviction.

The oral instruction is as follows: 'The law presumes a man to intend the natural and probable consequence of his act and if they (the jury) believe from the evidence that the accused struck the cow with a deadly weapon, the presumption of the law is that he unlawfully intended to maim, disfigure, and kill the cow. The court further told the jury that there was no evidence in the case

to sustain a verdict of maliciously wounding or killing said cow and therefore, the only crime of which the accused could be found guilty under any circumstances was that of unlawfully wounding or killing said cow.’ (Parenthesis supplied.)

In the case of *Thacker v. Commonwealth*, 134 Va. 767, 114 S.E. 504, 505, it was said, ‘the law can presume the intention so far as realized in the act, but not an intention beyond what was so realized. The law does not presume, because an assault was made with a weapon likely to produce death, that it was an assault with the intent to murder. And where it takes a particular intent to constitute a crime, that particular intent must be proved either by direct or circumstantial evidence, which would warrant the inference of the intent with which the act was done.

‘When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found as a matter of fact before a conviction can be had; and no intent in law or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter.’ *Roberts v. People*, 19 Mich. 401; *Maher v. People*, 10 Mich. 212, 81 Am.Dec. 781; *Vandermark v. People*, 47 Ill. 122; *Callahan v. State*, 21 Ohio St. 306; *Kunkle v. State*, 32 Ind. 220; *State v. Meadows*, 18 W.Va. 658; 3 Bish. New Crim. Proced., page 1290; *Kinnebrew v. State*, 80 Ga. 232, 5 S.E. 56; *Lacefield v. State*, 34 Ark. 275, 36 Am.Rep. 8.

In the case at bar the statute referred to makes the offense consist of an act combined with a particular intent. That intent cannot be presumed but must be proven. There was no room in the case for the instruction as given. The evidence was quite to the contrary. We think it constituted error which we cannot say was harmless.

The judgment complained of will be reversed, the verdict of the jury set aside, and the case remanded and the trial court directed to discharge the accused from further prosecution under this indictment.

Critical Thinking Questions: Why do you believe the prosecution charged the defendant with malicious intent to kill rather than “unlawful wounding”? In your opinion, should there be a difference in sentencing for the two offenses or should sentencing depend on the harm caused? Do you believe that the defendant would “get off” in a retrial on the unlawful wounding charge? Why or why not?