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CRIMINAL LAW-MANSLAUGHTER-EFFECT OF VIOLATION OF STATUTE OR ORDINANCE ON CRIMINAL NEGLIGENCE

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CRIMINAL LAW—MANSLAUGHTER—EFFECT OF VIOLATION OF STATUTE OR ORDINANCE ON CRIMINAL NEGLIGENCE—Defendant was convicted of the crime of negligent homicide and appealed, alleging that the Louisiana statute,[1] making violation of a statute or ordinance presumptive evidence of criminal negligence, was repugnant to the due process clauses of the state and federal constitutions. *Held*, affirmed. The effect of the statute is merely to

[1] "Negligent homicide is the killing of a human being by criminal negligence. The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence." La. Crim. Stat. Ann. (1943) Art. 740-32.

shift the burden of introducing evidence of one element of the crime charged: that of criminal negligence. The presumption does not operate as a prima facie presumption of guilt of the crime and the state must still prove every element of the offense. *State v. Nix*, (La. 1947) 31 S. (2d) 1.

The decisions are not in harmony as to the effect that the violation of a statute or ordinance will have upon the question of criminal negligence or if the question of negligence has any significance at all. The common law definition of involuntary manslaughter is unintentional killing during the commission of an unlawful act, not amounting to a felony, or in doing a lawful act in an unlawful manner.[2] Some jurisdictions adhere to the idea that if the death is caused by the commission of an unlawful act, all that need be proved is the violation of the law and that it was the proximate cause of the death,[3] the question of negligence being immaterial.[4] Other jurisdictions hold that criminal negligence is necessary to uphold a conviction of involuntary manslaughter, even if death is caused during the commission of an unlawful act. In states requiring criminal negligence, one view is that violation of a statute is in and of itself criminal negligence; [5] another that the statutory violation makes the defendant prima facie guilty of such negligence.[6] Some jurisdictions distinguish between unlawful acts that are *malum in se* and those that are *malum prohibitum*. As to statutes *malum in se*, not amounting to a felony, the common law approach is adhered to and if the defendant causes death while engaged in the violation of such a statute, the question of negligence is immaterial.[7] Violation of statutes *malum prohibitum* are approached in a different manner and the question of negligence becomes important. The violation in itself is not enough on which to predicate manslaughter, unless accompanied by criminal negligence.[8] The state must show more than a statutory violation: it must show that the violation was accompanied by conduct which would be deemed reckless,[9] or dangerous,[10] or committed with reckless disregard for the life or the safety of others.[11] If such conduct is shown in addition to the violation of the statute, it is sufficient to warrant a finding of criminal negligence.[12] These states which differentiate between acts *malum in se* and *malum prohibitum* say that violations

[2] 40 C.J.S., Homicide, § 55.

[3] Kearns v. Commonwealth, 243 Ky. 745, 49 S.W. (2d) 1009 (1932); Massie v. Commonwealth, 177 Va. 883, 15 S.E. (2d) 30 (1941).

[4] People v. Wardell, 291 Mich. 276, 289 N.W. 328 (1939); Commonwealth v. Gill, 120 Pa. Super. 22, 182 A. 103 (1935) (the court said that if the death is caused by an act forbidden by law it constitutes involuntary manslaughter regardless of whether the defendant was negligent). See also Commonwealth v. Bergen, 134 Pa. Super. 62, 4 A. (2d) 164 (1939); Thompson v. State, 131 Ala. 18, 31 S. 725 (1902).

[5] State v. McIvor, 31 Del. 123, 111 A. 616 (1920).

[6] Steffani v. State, 45 Ariz. 210, 42 P. (2d) 615 (1935).

[7] People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921).

[8] Thiede v. State, 106 Neb. 48, 182 N.W. 570 (1921) (acts *malum prohibitum* and those *malum in se* clearly distinguished, and difference illustrated).

[9] State v. Cope, 204 N.C. 28, 167 S.E. 456 (1933); Potter v. State, 162 Ind. 213, 70 N.E. 129 (1904).

[10] Estell v. State, 51 N.J.L. 182, 17 A. 118 (1888).

[11] State v. Reitze, 86 N.J.L. 407, 92 A. 576 (1914).

[12] State v. Lingman, 97 Utah 180, 91 P. (2d) 457 (1939).

of the latter type of statutes may be used as evidence of criminal negligence. It has been held that it is not erroneous to read to the jury the code provisions violated, as such provisions may have an evidentiary bearing on determining the question of criminal negligence; but the jury should be told that the violation does not of necessity establish this negligence.[13] The violation of the statute may serve only as a basis on which criminal negligence may be found.[14] Negligence, if it is to be criminal, must be of a greater degree than that which is the basis of liability in civil suits. Thus, as to acts *malum prohibitum*, if a court is to instruct that the violation of a statute is in itself negligence, it must go further and point out the elements necessary to raise simple negligence to criminal negligence or else commit reversible error.[15] There is another possible view, seemingly followed by at least one state, that no distinction is to be drawn between the type of statute violated: violation of any statute is negligence but such negligence is not enough to establish the willful, wanton, and reckless conduct necessary to warrant a finding of criminal negligence unless additional factors are introduced by the state to establish such conduct.[16] It is interesting to note that, in the principal case, the court recognizes that the code provision is a legislative rejection of a prior decision of the court,[17] in which it held that the violation of a statute or ordinance is of itself criminal negligence. While the principal case in upholding the code provision allows a presumption of criminal negligence in favor of the state, it holds that this is to be interpreted as merely shifting the burden of introducing evidence. This is a decided break with the former doctrine as set forth by the Louisiana court and with the states which hold that the question of negligence is immaterial or that the violation is of itself criminal negligence or prima facie criminal negligence. While the interpretation does not go so far as to say that the violation has nothing but an evidentiary effect, it is only slightly removed from the decisions which advance this view.[18]

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[13] State v. Campbell, 82 Conn. 671, 74 A. 927 (1910).

[14] Cutshall v. State, 191 Miss. 764, 4 S. (2d) 289 (1941).

[15] Wells v. State, 162 Miss. 617, 139 S. 859 (1932).

[16] Commonwealth v. Arone, 265 Mass. 128, 163 N.E. 758 (1928).

[17] State v. Wilbanks, 168 La. 862, 123 S. 600 (1929). Here the court said, at p. 866, "We conclude, and we do not think the question open to controversy, that where a person operates his automobile . . . in violation of a penal statute he is guilty of culpable and criminal negligence. . . . The statute imposes a penalty for operating an automobile at night without lights, and its violation amounts to something more than simple negligence arising from some act of mere omission of duty. The act of violation is within and of itself criminal and culpable negligence."

[18] There is a diversity of opinion as to whether the violation of an ordinance will be enough on which to predicate manslaughter. There is authority to the effect that the violation of a valid ordinance falls within the meaning of the term "unlawful act" and hence the issue of negligence does not enter the picture. Hayes v. State, 11 Ga. App. 371, 75 S.E. 523 (1912). Opposing authority treat the violation of an ordinance in the same manner in which many jurisdictions treat the violation of a statute *malum prohibitum*. State v. Clark, 196 Iowa 1134, 196 N.W. 82 (1923). Here, unless elements such as utter carelessness or a reckless disregard of the safety of others, which go to make up criminal negligence, are present, the violation is not sufficient to support a manslaughter charge. State v. Thomlinson, 209 Iowa 555, 228 N.W. 80 (1929).