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If the draftsman will keep in mind the general principle and the relatively few pitfalls which stand in the way of a lease being deemed bona fide, it will enable him to draft the lease so that it will be upheld by the Commission and the courts. If the lessor is a motor carrier, he must first look to see if there has been an order pursuant to Ex Parte MC-43. The magnitude of the investigation, which concerns itself mainly with interchanging and augmenting equipment between contract and common carriers, necessarily delays any permanent order being formulated; still, one will be forthcoming which might well contain further prohibitions. The guiding principle in all these lease cases is to look through the form of the lease to see whether the lessor is in substance engaged in transportation for hire, and this includes the situation where he has control, direction and domination of the performance of the service. However, it has been deemed almost without exception that leases of vehicles and drivers together and "trip-leases" constitute the lessors contract carriers. Other factors which have frequently occurred in the cases and given weight in determining that the lessor was a contract carrier are compensation computed on the amount of the cargo carried, the lessor being responsible to the lessee for the safe delivery of the cargo and to the public for any liability that may be incurred, and the vehicle having marks of identification that indicate that it is owned and operated by the lessor. Still, if these factors can be avoided and transportation by leased motor vehicles can be arranged, it might well be the remedy so diligently sought by the shippers to ameliorate the present transportation situation which has so burdened them with worry.

JAMES M. MARKS

THE MISDEMEANOR MANSLAUGHTER DOCTRINE UNDER MODERN STATUTES*

There are many problems facing the prospective codifier of the law of homicide. Of these, one of the most interesting is the crime of involuntary manslaughter. The usual common law definition of this crime is similar to that used by a United States District Court, "Involuntary Manslaughter is where death resulted unintentionally, so far as the defendant was concerned, from an unlawful act on his part, not amounting to a felony, or from a lawful act negligently performed." The same label and punishment are attached to a homicide committed in the perpetration of a *misdeemeanor* ("an unlawful act not amounting to a felony"), and to a homicide resulting from the *negligent commission of a lawful act*.

This note will be concerned only with the so-called misdemeanor manslaughter phase of the crime of involuntary manslaughter as it now exists under statutes in the United States. A brief discussion of the common law rules of the crime will be in order to lay a foundation for the analysis of the statutes.

Hale stated that an unintentional homicide occurring in the course of any misdemeanor was manslaughter. He, however, suggested a limitation on this harsh rule by making a distinction between those misdemeanors *malum in se* and

* This is a companion note to the one by Mr. Gromley on page

¹ U.S. v. Meagher, 37 Fed. 875, 880 (C.C. W.D. Tex., 1888).

those merely *malum prohibitum*. Fundamentally, this is a difference between misdemeanors "bad (dangerous) in themselves" and those merely prohibited by law. A small majority of American Courts have followed this distinction and have refused to sustain a conviction if the misdemeanor is merely *malum prohibitum*; it must also be *malum in se*.³ Another requirement that is generally recognized is that there must be a causal relation between the misdemeanor and the homicide.⁴

An examination of the misdemeanor manslaughter statutes as they exist today reveals that only about half of the states have such statutes and that they are generally vague and unsatisfactory. Twenty-five states have statutes defining the crime. Their general effect is to codify the common law. Any division of them is purely mechanical and will point up differences in phraseology only. There is little substantive variance to note. The writer considers that there are six basic categories into which the statutes fall.

The first group is composed of five states, of which Arizona is typical:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner. " (Italics, writer's)

Other states are California, Montana, New Mexico and Utah.⁵

It will be observed that this statute uses the common law definition of the crime of involuntary manslaughter. The statute begins with a general definition of the crime of manslaughter; it then points out the basic difference in that crime and the one of murder, *i.e.*, want of malice; it then divides manslaughter into two component parts, voluntary and involuntary. Involuntary is further subdivided into the misdemeanor manslaughter and the negligent manslaughter.

The basic concept of what type of criminal act will sustain a conviction under a charge of misdemeanor manslaughter is codified by this statute, but from the wording of the act, a conviction might well result from a crime that was less than a misdemeanor, *i.e.*, a civil offense. Such possibility results from the limiting phrase, "not amounting to a felony." It will be noted that the statute does not codify the requirement of casual relationship.

The statutes in the next group are similar to that of Illinois:

"Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the

¹ HALE, HISTORY OF THE PLEAS OF THE CROWN 475, 476 (1847). For a discussion of what acts are usually considered to be *malum in se* and *malum prohibitum*, see Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*. 87 PENN. L. REV. 811, 828 (1939).

² People v. Barnes, 182 Mich. 179, 148 N.W. 400 (1914). See Wilner, note 1 *supra*.

³ Potter v. State, 162 Ind. 213, 70 N.E. 129, 64 L.R.A. 942 (1904).

⁴ 3 ARIZ. CODE ANN. sec. 43-2904 (1939).

⁵ CAL. PEN. CODE sec. 192 (Deering, 1949); 8 MONT. REV. CODE ANN. sec. 94-2507 (1947); 3 N. M. STAT. ANN. sec. 41-2407 (1941); 5 UTAH CODE ANN. sec. 103-28-5 (1943).

life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."⁷ (Italics, writer s)

Other states in the group are Colorado, Georgia, Nevada and Idaho.⁸

It will be immediately perceived that this statute, although not saying that the illegal act shall be one "not amounting to a felony," as in the Arizona statute, achieves the same result by the subsequent provision, "committed in the prosecution of a felonious intent." This statute, however, suffers a similar weakness to that of the Arizona act. It does not specifically limit the criminal act to misdemeanors, and civil offenses could result in a conviction. One good feature of the statute is that it enacts the common law requirement that the act must be *malum in se*.

Six states fall in the Kansas group:

"The killing of a human being without a design to effect death, by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration, or attempt to perpetrate any crime of misdemeanor." ⁹ (Italics, writer s)

Others are Mississippi, North Dakota, Oklahoma, South Dakota, and Wisconsin.¹⁰

The differentiating feature of this and the previous statutes is the fact that the word "misdemeanor" is used. This would seem to limit the crime to pure misdemeanors. However, the effectiveness is lessened by the introductory words "any crime." It is submitted that although felonies are excluded, there is a possibility that civil offenses may be used to sustain a conviction. Nothing is said about causal relationship or the requirement that the act be *malum in se*.

The Indiana¹¹ statute is perhaps the poorest type that exists today.

"Whoever voluntarily kills or involuntarily (kills) in the commission of some unlawful act, is guilty of manslaughter"

Arkansas, Nebraska, Oregon, Tennessee and Wyoming complete the group.¹²

All this statute says is that the act shall be "unlawful." The criminal quality of the act is not limited. Under a literal interpretation of such a statute, both felonies and civil offenses could be used to sustain a conviction. Such a poorly phrased act could create a chaotic situation, and result in much injustice. Furthermore, nothing is said in the statute concerning the casual relationship between the crime and the homicide, and the *malum in se* concept is not specifically enacted.

ILL. REV. STAT. c. 38, sec. 363 (1949).

⁸ 2 COLO. STAT. ANN. c. 38, secs. 33, 36 (1935); 6 GA. CODE ANN. sec. 67 (Park, 1914); 5 NEV. COMP. LAWS ANN. sec. 10072 (1929); 4 IDAHO CODE ANN. sec. 18-4006 (1945). The Idaho statute does not use the same phraseology, but accomplishes the same result by using the words, "in perpetration of or attempt to perpetrate any lawful act, other than arson, rape, robbery burglary or mayhem."

⁹ KANS. GEN. STAT. ANN. sec. 21-407 (1935).

¹⁰ MISS. CODE ANN. sec. 2221 (1942); 1 N. D. REV. CODE sec. 12-2717 (1943); OKLA. STAT. ANN. tit. 21, sec. 711 (1941); 1 S. D. CODE sec. 13.2013 (1939); WIS. STAT. sec. 340.10 (1949).

¹¹ 4 IND. STAT. ANN. sec. 10-3405 (Burns, 1942).

¹² 4 ARK. STAT. ANN. sec. 41-2209 (1947); 2 NEB. REV. STAT. sec. 28-403 (1943); 3 ORE. COMP. LAWS ANN. sec. 23-406 (1940); 7 TENN. CODE ANN. sec. 10774 (Williams, 1934); 1 WYO. COMP. STAT. ANN. sec. 9-205 (1945).

The statutes of New York¹³ and Minnesota,¹⁴ being identical, are the most unusual of all the statutes thus far considered. They divide the misdemeanor manslaughter into degrees. As defined, manslaughter in the first degree consists of those misdemeanors affecting *person or property*, while manslaughter in the second degree consists of those homicides committed during the course of a trespass or the invasion of a private right, not amounting to a crime. There is, of course, a corresponding difference in punishment.

The second provision specifically enacts that thing which the writer feels is a failure of most of the other statutes; it allows a crime less than a misdemeanor to sustain a conviction. It is felt that this is a very harsh rule, especially in view of the fact that most trespasses and invasions of private rights are not tainted with criminality. Declaring a homicide to be manslaughter if it occurs during the commission of such an act has no basis in logic and is an unwise social policy.

The last group consists of one state, Louisiana:

"Manslaughter is:

- (2) A homicide committed, without any intent to cause death or great bodily harm,
 - (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30, or any intentional misdemeanor directly affecting the person.¹⁵

Note that a conviction could be based upon a felony which had not been set out in section 30. This expands the concept of the misdemeanor manslaughter. The crime is limited to *intentional misdemeanors affecting the person*. This is a serious limitation to the crime. Since this is true, the only crimes it includes are assaults, batteries and others of a similar nature. A similar provision in New York has been construed to be inapplicable in a case of a killing by a drunken driver.¹⁶ No requirement of causal relation is set out, and the *malum in se* doctrine is omitted.

In drafting a model statute, the writer feels that the crime of involuntary manslaughter should be carefully subdivided into a crime involving homicide arising out of the commission of a lawful act. It is basic that the statute should state that the homicide was done without malice, and is unintentional. Furthermore, in order to eliminate the possibility of an improper interpretation which might result in a miscarriage of justice, the statute must emphasize the requirement of a causal relation between the act and the homicide.

One of the most controversial issues at the common law was the distinction drawn between acts *malum in se* and those merely *malum prohibitum*. In spite of all the criticism of this distinction, it is felt that so long as the misdemeanor manslaughter is retained as a separate crime, there is a valid basis for the distinction. It appears obvious that many statutory misdemeanors are merely the whim of the legislature and involve no element of danger. The phrases *malum in se* and *malum prohibitum* are, however, poor words to describe the import of the distinction. There must be a more apt phrase to incorporate the concept. Also,

¹³ N. Y. PEN. CODE secs. 1050, 1052 (Thompson, 1939).

¹⁴ 2 MINN. STAT. secs. 619.15, 619.18 (1945).

¹⁵ LA. CODE CRIM. LAW & PROC. ANN. art. 740-31 (Hart, 1943).

¹⁶ *People v. Grieco*, 266 N. Y. 48, 193 N.E. 634 (1934).

the statute, as a whole, must be stated in positive language to assure a standard interpretation by the courts.

The following model statute is submitted as effecting the ideas found in the above paragraph:

“Manslaughter:

I. Voluntary —

II. Involuntary — Involuntary manslaughter is the unintentional, unlawful killing of a human being. It is of two kinds:

- (1) In the perpetration, or attempt to perpetrate, any common law or statutory misdemeanor which endangers human life and safety. The homicide must be the proximate result of the commission of, or attempt to commit, the misdemeanor.
- (2) In the commission of any lawful act in a criminally negligent manner.”

It will be noted that the ultimate test for conviction under subsection (1) and subsection (2) is the same, although stated in a different manner. Liability is based upon the amount of danger in the act under sub-section (1), while negligence is the basis of liability in sub-section (2). Negligence, however, is determined by the foreseeability of danger. Thus a conviction of involuntary manslaughter may only be obtained by showing a dangerous act. Any conviction that could be obtained under sub-section (1) could also be obtained under sub-section (2). It follows that it might be well to eliminate the misdemeanor manslaughter and to base the conviction of involuntary manslaughter solely upon negligence.

ROBERT F STEPHENS

MISDEMEANOR MANSLAUGHTER UNDER STATE STATUTES*

Today, in the absence of statute, it is involuntary manslaughter where one unintentionally kills another in the commission of an unlawful act not amounting to a felony.¹ This is usually referred to as the misdemeanor manslaughter doctrine. Under this rule the killing is done without any design, intention or purpose of killing, but in the commission of some unlawful nonfelonious act.

This rule is the basis for the “misdemeanor manslaughter” statutes which have been adopted by twenty-five states. Before examining these statutes, it is essential that the common law be closely observed. The mental state which characterizes the crime of involuntary manslaughter is the absence of intention to cause death. In determining whether a culpable homicide was committed by a person while engaged in the commission of a misdemeanor, it is not necessary to conclude that he shall have *intended* to violate the law, although he must have had an intent to commit the *act*. The unlawful act, however, must be dangerous in itself or in marked disregard of the safety of others. A mere thoughtless omission or slight deviation from the norm of reasonable conduct will not suffice. The state of mind of the person while committing the act is not controlling. Fur-

* This is a companion note to the one by Mr. Stephens on page

¹ Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*, 87 PA. L. REV. 811 (1939).

² See, *Westrup v. Commonwealth*, 123 Ky. 95, 93 S.W. 646 (1906).