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Criminal Law--Murder with Malice--Negligence

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statute, a substantial equality is afforded the negro in another state where unpleasantries need not be suffered. But, accepting this as a solution, we are still confronted with the dilemma which arises when a state more deeply southern, as Florida, attempts to enact a similar statute. In Missouri the facilities of the adjacent state lend more to the reasonableness of "equality", than in the case where the colored applicant would find it necessary to traverse several states and hundreds of miles to acquire the benefits offered him by the state.

To the crusader, acceptance of the doctrine set out in the instant case may seem a flagrant violation of the "equal protection" guaranteed citizens under the Federal Constitution, but to one more concerned about the best interests of the colored race, the solution suggests itself as a sane and acceptable answer to a difficult situation.

JOHN B. BRECKINRIDGE.

CRIMINAL LAW—MURDER WITH MALICE—NEGLIGENCE

The defendant, who had drunk five bottles of beer and was admittedly not sober when he began drinking beer, drove out of town at sixty miles per hour, swerved completely across a nine-foot highway to his left, striking and killing two boys walking eight feet off the pavement in the weed growth. Held, that evidence establishing these facts was sufficient for the jury to find the driver guilty of murder with "malice". Cockrell v. State, ...... Tex. Cr. R. ......, 117 S. W. (2nd) 1105 (1938).

Texas has by statute created four degrees of culpable homicide: (1) Negligent homicide in the first degree, (2) Negligent homicide in the second degree, (3) Murder without malice, and (4) Murder with malice.¹

Without discussing what other degrees the defendant in this case might have been convicted of, it is pertinent to see wherein the court was justified in finding him guilty of murder with malice. It is to be presumed, as the defendant was prosecuted under the general law governing homicide, with the intent "to prove, if possible, a killing with malice," that instructions were properly submitted to the jury.² Since it was held that the evidence was sufficient to justify the jury in finding the defendant guilty of murder with "malice", the important consideration of what constitutes "malice aforethought" or "malice" in this case is of primary concern.

In determining what constitutes malice here, the court cited and followed the case of Banks v. State, in which it had been said that "Malice may be toward a group of persons as well as toward an individual. It may exist without former grudges or antecedent menaces. The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice."³ Collins v. State⁴ decided malice to be "a state
or condition of the mind showing a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken."

On the subject of malice in reference to murder, we may take the treatment by Stephen as probably best expressing the views of most of the common law writers. It is the second state of mind which he describes as meaning malice which fits the case under review. This state has been variously termed as "a general malignity of heart"," the heart regardless of social duty and deliberately bent on mischief", "such a willful act as shows him to be an enemy of all mankind", etc. However phrased it is essentially the same thing as expressed in the quotation from the Banks case.

In the case of Simmons v. State, the charge given by the trial court to the effect that "The intentional doing of an unlawful act in

1 Vernon's Ann. P. C., arts. 1230 to 1257c.
2 Art. 1257b of the Penal Code states, with reference to instructions: "In all cases tried under the provisions of the Act, it shall be the duty of the court to define 'malice aforethought', and shall apply that term by appropriate charge to the facts in the case, and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years."
5 "In reference to murder, 'malice'—means any one of the following states of mind, preceding or co-existing with the act or omission by which death is caused:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intent to commit any felony whatever.

(d) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such officer so employed . . ." 3 Hist. Crim. Law of Eng. (1833) 22.

*This phase of homicide was given extensive treatment in the Report of the Law Revision Commission of the State of New York (1937), Sec. 3, pp. 103-131. There we find this recommendation: "The proposal, therefore, which seems most desirable would retain within the murder section only that part of "depraved mind" cases in which an intent to kill existed, although directed toward no specific individual." (Page 131.)
7 1 East, Pleas of the Crown (1803), 269.
9 Blackstone, Commentaries, p. 200.
10 113 Tex. Cr. R. 53, 19 S. W. (2nd) 44 (1929). It was further said: "Negligent homicide in the second degree is defined in articles
such manner and under such circumstances as that the death of a human being may result therefrom is malice” did not meet the approval of the Court of Appeals. The court there recognized that an act which may result in death to some one cannot form the basis of an inferred malice unless the likelihood of such death resulting is so great that no reasonable man and only one who has a reckless and wanton disregard for the consequences would do it.

It is unfortunate that the decision of the Banks case is couched in such strong inclusive language. The court reached the right result but the idea must not be fostered that every unlawful act resulting in homicide will sustain an inference of malice on which to predicate a verdict of murder.

Whether the defendant in the Cockrell case be regarded as doing an unlawful act or as doing a lawful act in an unlawful manner, he did it in a manner “evincing a heart regardless of social duty” and from that the law will imply malice.

Marvin Tincher.

Conveyances—Validity of Parol Agreements as to Determinable Boundary Lines

A and B owned adjoining patents of land granted on the same day and lying between two tracts of land to which A later acquired title. A conveyed to B parts of these two tracts of land, described as being below a certain previously made and partly marked out line which passed over one tract of land, over B’s land, and then over the other tract. It is the space between where this line passed over B’s land and the original dividing line between A’s and B’s patents which is in dispute. Plaintiff derives title from A and seeks to enjoin trespass on the part of the defendants, who hold under B. Plaintiff claims that the boundary line between their lands is not the boundary as set out in the original grants but the line as set out in the conveyance from A to B, which has been agreed upon and recognized for many years. Held: The land in dispute belongs to defendants. Howard v. Howard et al., 271 Ky. 773, 113 S. W. 2d. 434 (1938).

The deed which traced the line claimed by plaintiff as the true line did not purport to establish a divisional line but only to convey certain land in other patents and so the original boundary was not affected. It was contended that the line claimed by plaintiff had long been the agreed line, but the court held that there could have been no valid parol

1238–1243 P. C., and comprehends the doing of an unlawful act, which act the doer may clearly intend to do, yet in charging the jury in such case it would be entirely proper to tell them that one who did by negligence and carelessness cause the death of a human being would be guilty of negligent homicide in the second degree, etc., and this would be true, even though the facts show the wrongful act to have been intentionally done. That the ‘unlawful act’ referred to was done intentionally would not make such homicide one upon malice.”

ii Supra, paragraph 4.