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Crime--Statutory Degrees of Homicide in Kentucky

Harry I. Stegmaier
University of Kentucky

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of a victualer for selling unfit food does not arise out of any contract or implied warranty.

Williston on Sales, Sec. 241, refers to old criminal statutes as being the basis for the talk of warranty in such cases.

The only cases which have come to the attention of the writer and which decide the precise point as is involved in the principal case, and hold the defendant liable under an implied warranty are \textit{Leahy v. Essex Co.}, 164 App. Div. 903, 148 N. Y. Supp. 1963 (1914), and \textit{Rinaldi v. Mohican Co.}, 171 App. Div. 814, 157 N. Y. Supp. 561 (1916).

In supporting its opinion of an implied warranty in such cases the Massachusetts court cited the Kentucky case of \textit{The Commonwealth v. The Phoenix Hotel Co.}, 157 Ky. 180, 162 S. W. 823 (1914). The defendant Hotel Co. was indicted for exposing for sale quail at a time of the year prohibited by statute. It was held that a guest at a hotel or restaurant who is served quail for a sum of money as certainly purchases and the proprietor of the hotel or restaurant as surely sells it as if it were purchased from a dealer who held it for sale, and was carried home by the purchaser to be eaten at home. The court uses strong words, but this is not a question of tort or implied contract liability. It appears that the court reaches a sound result under a criminal statute. However, it does not necessarily follow from this case that in a civil action the transaction would be held to be a sale of goods carrying with it an implied warranty.

It does not seem that public policy and justice demand that a restaurant owner should be held to impliedly warrant the fitness for human consumption of the food served by him, making him liable no matter how carefully he may prepare and serve it. Such absolute liability is not necessary for the protection of the public, and is very likely to result in the prosecution of groundless claims. If it should be considered necessary to place such absolute liability on restaurant owners, and in effect make them insurers of the health of their patrons, the change would be a subject for legislative action and should not be left to a decision of the courts.

\textit{J. R. Richardson.}

\textbf{CRIMES—Statutory Degrees of Homicide in Kentucky.—The Kentucky Statutes with which we are concerned are as follows:}

Sec. 1149. Murder. If any person be guilty of wilful murder, he shall be punished with death or confinement in the penitentiary for life, in the discretion of the jury;

Sec. 1150. Voluntary Manslaughter. Whoever shall be guilty of voluntary manslaughter shall be confined in the penitentiary not less than two nor more than twenty-one years;

Sec. 1151. Unintentional Killing. Any person who shall wilfully strike, stab, thrust, or shoot another, not designing thereby to produce or cause his death, and which is not done in self-defense, or in an attempt to keep and preserve the peace, or the lawful arrest or attempt
to arrest a person charged with felony or misdemeanor or in doing any other legal act so that the person struck, stabbed, thrust, or shot shall die thereof within six months next thereafter shall be confined in the penitentiary not less than one nor more than six years.

There is little doubt of the effect of the first two statutes as set out in view of the unequivocal language concerning them used in the recent case of *Lucas v. Commonwealth*, 231 Ky. 76, 21 S. W. (2d) 113 (1929), in which Commissioner Stanley said, "Our statutes do not attempt to define either murder or voluntary manslaughter, but only prescribe the penalty therefor."

The solution of Sec. 1151 is not so free from difficulty. It is highly significant to note that there has never been an indictment under the statute although it has been law for over a century. 2 Littell's Laws 467 (1801). The only method by which the question has ever been raised has been the propriety of giving an instruction covering the statute upon an indictment for murder in view of sections 262 and 263 of the Criminal Code. At this point it would be well for a better understanding of the problem to copy the parts of 262 and 263 which relate to the situation:

Sec. 262. Upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment;

Sec. 263. The offenses named in each of the subdivisions of this section shall be deemed degrees of the same offense, in the meaning of the last section:

1. All offenses of homicide........................

In *Terrell v. Commonwealth*, 76 Ky. 246 (1877), there was a conviction of voluntary manslaughter under an indictment for murder. During the course of the trial the court after instructing the jury in the law of murder and voluntary manslaughter gave the following: "The court instructs the jury that if they shall believe—that the accused—not in his necessary or apparently necessary self-defense, and not in an effort to keep the public peace, with a pistol—did shoot and wound one Harvey Meyer, from the effects of which wounding the said Meyer then and there presently died, they should find him guilty of involuntary manslaughter, and affix his punishment at a confinement in the penitentiary for any period of time of not less than one nor more than six years." Defendant moved to set aside the indictment upon the ground that an instruction by the trial court as to involuntary manslaughter was erroneous because involuntary manslaughter is not an offense eo nomine punishable by the General Statutes, and is either obsolete, or no law exists in this state for its punishment. Counsel for the Commonwealth, on the other hand, contended that by statute, Sec. 1151, involuntary manslaughter is defined, described, and the punishment prescribed, and there was no error in naming the offense involuntary when Sec. 1150 has given the punishment for vol-
The appellate court ruled, "that the crime denounced in the statute was inaccurately called involuntary manslaughter in the instruction, can not have prejudiced his substantial rights, and the giving of the instruction furnishes no ground for reversing the judgment." Conner v. Commonwealth, 13 Bush 714 (1878), shortly followed where, upon an indictment for murder, conviction was had under the instruction of the court for the statutory offense, Sec. 1151. It was held that, under Sec. 262 and Sec. 263 of the Criminal Code of Practice this statutory offense was not a degree of homicide; that, therefore, under indictment for murder the defendant could not be found guilty of this offense; and that a conviction of the statutory offense under an indictment for murder was equivalent to an acquittal of the crime of murder and all subsidiary crimes included in it, and the court erred in not discharging the prisoner on his motion. In commenting on this Statute the court pertinently remarked, "no punishment is prescribed by statute for involuntary manslaughter, unless section 2, article 4 (Sec. 1151) can be construed as defining that crime.—At the common law there could be neither murder nor voluntary manslaughter or involuntary manslaughter unless the person slain died within a year and a day after the injury was received. The offense described in the statute is not committed unless the person slain shall die of the injury within six months next after it is received. The statutory offense is therefore not the same as the common law offense of involuntary manslaughter. Moreover the statutory offense is limited to cases in which the homicide results from striking, stabbing, thrusting, or shooting, thus omitting to provide for the punishment of unintentional homicide when committed in any other mode. We are therefore of the opinion that sec. 2, art. 4 (Sec. 1151) was intended to create a new offense and not to provide for the punishment of the common law offense. And this conclusion is further fortified by the fact that the crimes of murder and voluntary manslaughter are not defined in the statute, but punishment denounced against them by name only, and the conclusion is not easily avoided that if it had been intended by article 2, section 4 (Sec. 1151) to punish involuntary manslaughter the same course would have been pursued, and the offense would have been punished by name as was done in respect to murder and voluntary manslaughter.—In Terrell's Case, we were in error on this point, and so much of the opinion in that case as is in conflict with the views expressed in this opinion is overruled."

Buckner v. Commonwealth, 77 Ky. 601 (1879), further elaborates that a person "may be guilty of involuntary manslaughter without being guilty of the statutory offense, but if guilty of the statutory offense he is also guilty of involuntary manslaughter, for the former includes every element of the latter."

It appears from a brief resume of all cases on the subject that the statute creates an offense entirely distinct from involuntary manslaughter as far as the question of procedure goes. Trimble v. Commonwealth, 78 Ky. 176 (1879). These decisions have
been criticized on the ground that "the courts have carried to its logical conclusion a highly technical rule of law. The effect of its application is apparently to defeat the ends of justice." Spriggs v. Commonwealth, 112 Ky. 695, 68 S. W. 1087 (1902). The rule has been justified for the reason that an indictment to be good for the statutory crime must negative the exceptions contained in the statute, and the offense must be described in the words of the statute. Houseman v. Commonwealth, 128 Ky. 818, 110 S. W. 236 (1908). To the writer the position of this tribunal seems indefensible. The exceptions mentioned specifically in the statute make homicide either justifiable or excusable. Therefore these exceptions are merely declaratory of the common law, and do not need to be set out in the indictment. This may be illustrated by the fact that under an indictment for murder a conviction may be had for a malicious cutting and wounding as defined by Ky. St. Sec. 1166, or for cutting in sudden heat and passion as defined by Sec. 1242. Houseman v. Commonwealth, supra. These offenses are as much created by statute and contain as many exceptions as Sec. 1151. Likewise Criminal Code Sec. 264 provides that if an offense be charged to have been committed with particular circumstances, the offense without the circumstances, or with part only, is concluded, though the offense charged may be a felony, and the offense without the circumstances a misdemeanor only. Sec. 1151 contains no requirement nor exception which is broader than those enforced in non-statutory homicide. It is evident, consequently, that the requirement of the statute on this point is comprehended within the crime of common law murder. Nevertheless, this unreasonable and arbitrary distinction has recently been upheld. Smith v. Commonwealth, 228 Ky. 710, 15 S. W. (2d.) 458 (1929).

The scope of this act and the change of the common law with respect to matters other than pleading are questions which seem next in order. The cases have made no decisive statements upon this phase of the subject. As already noticed the common-law period of a year and a day has been shortened to six months. Conner v. Commonwealth, supra. Several cases are authority for the proposition that it comprises a narrow and limited field in the crime of involuntary manslaughter. Buckner v. Commonwealth, supra. In this ruling the judges are in error. The statute distinctly states that "any person who shall wilfully strike—another, not designing thereby to produce or cause his death. . . ." Consequently the statute with finality denies that it was intended to apply to any cases of involuntary manslaughter. It is submitted that Sec. 1151 refers to certain cases of murder and voluntary manslaughter where there is no actual design or intent to kill, and death occurs through shooting, stabbing, or striking. It is urged that the Legislature intended to make a distinction between murder, where there is an actual design to produce death, and murder where there is inferred intention in regard to punishment. This appears logical in view of the fact that there are statutes setting out the penalty for wilful murder, and voluntary manslaughter. The writer con-
tends that the Legislature has undertaken solely to prescribe the punishment for a few special instances of murder and voluntary manslaughter, and did not intend to change the common law definitions of homicide.

There have been many occasions cited in the late reporters where a conviction upon an indictment under Ky. St. Sec. 1151 would have been appropriate, but which have been decided according to the principles of the common law as to the terms and types of punishment without any consideration of the statute. *Smith v. Commonwealth,* 228 Ky. 710, 15 S. W. (2d) 458 (1929); *Kearns v. Commonwealth,* 243 Ky. 745, 49 S. W. (2d) 1009 (1932); *Fox v. Commonwealth,* 248 Ky. 466 (1933); *Tackett v. Commonwealth,* 245 Ky. 98 (1932). The courts have consistently failed to punish under the act due presumably to the failure of attorneys to call its force and effect to their attention. It is suggested that the statute should be repealed since during its great age of existence it has only been called into question a few times, and because it has caused considerable confusion in the body of the law, and has been almost totally ignored both by the courts and counsel. Another reason is that in many instances, especially in the crime of murder, the punishment prescribed would be inadequate, and would fail to deter those offenses for which purpose it was adopted. As it stands the law is a dead letter.

Summarizing, murder is defined as at common law, and is punished by Sec. 1149. There are no degrees of murder in the state of Kentucky. The definition of voluntary manslaughter is derived from the common law, but it is punished by Sec. 1150. Involuntary manslaughter is defined likewise, and the penalty is prescribed by common law as six months to one year in the county jail. In those cases of murder and voluntary manslaughter where there is an intentional striking, stabbing, or shooting with no actual design to kill but death occurs within six months after the event the penalty is set out in Sec. 1151.

HARRY I. STEGMAYER.