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W. B. Rubin

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MAY A PERSON BE CONVICTED OF A FELONY AND YET ESCAPE CIVIL LIABILITY THEREFOR?

W. B. RUBIN*

TO THE query suggested in the title, offhandedly one would answer "no."

Yet the Supreme Court's decision in *Clemens v. State*,¹ creates the paradox. Clemens was convicted of violating the manslaughter statute

Every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree."²

The trial court found as a matter of law that Clemens was guilty of but ordinary negligence*and not gross or wilful negligence, that there was a total absence of a criminal intent, or of any intent of wilful or gross negligence whatever; that whatever Clemens did was the result of mere inadvertence to observe a statutory requirement when his automobile ran into another automobile, colliding therewith and causing the death of the person in the other automobile, and that such death was the result of accident and misfortune.

The court, through Doerfler, J., made the following observation

The busy lawyer, under the law as we have now construed it, whose mind during the day has been absorbed in the consideration of the intricate problems that have been presented to him in the course of his professional activities during the day, and who by reason thereof is unable wholly to relieve himself of his absorbing thoughts, who, in an effort to regain a well-deserved relaxation at the end of his day's labor, in taking out his family for an automobile ride, exceeds the prescribed speed limit in the slightest degree, and as the result thereof a collision takes place which unfortunately causes the death of a human being, will be subject to a homicidal charge and a conviction thereof, which not only will be ruinous to his own happiness and welfare, but reflect seri-

* Member of the Milwaukee Bar.

¹ 176 Wis. 289, 185 N.W. 209.

² Sec. 4363 Wis. Stats.

ously upon the members of his family. The laborer employed in the construction of a large building, who while absorbed in the performance of his duties, or whose mind may incidentally be engaged in pondering over serious matters of domestic trouble and difficulty, inadvertently may drop some tool or an article of building material, as the result of which a human life may be lost. The result is that he has changed his status from a law-abiding citizen to that of a felon, and if he be endowed with the conscientious regard and appreciation which all good citizens should possess, namely, that of retaining his good name and reputation in the community where he resides, he must be keenly affected by the results wrought and the consequence of what can be termed nothing more than his misfortune. While the freedom from physical injury and the full possession of our physical and mental powers are most desirable, and while life itself is one of the dearest possessions with which man is blessed, the true citizen esteems his good name and his reputation of infinitely greater importance than either life or limb.

We have indulged in these comments merely to make it clear that we are not heartily in accord with the purport of the manslaughter statute in question, with the thought that at the earliest time available such changes be made in the statutes of our state by the legislature as will require, in order to convict of manslaughter in the fourth degree, gross negligence as defined in the decisions of this court, or that provision be made so that no one will come within the condemnation of this statute unless he is guilty of an act in violation of some penal law, as the result whereof human life is taken.

The legislature has not yet amended the section and we think the court was in error when it made a human act without an element of criminal intent and for which one may escape civil liability, a felony, and to prove that point is the purpose of this article.

The decisions quoted in the Clemens Case, with the exception of the Missouri Case, are civil cases.

The textbooks on criminal law cited in the Missouri cases uphold the contention we make that the intent is a necessary ingredient of the offense of manslaughter. True, the intent may be inferred from the surrounding facts and circumstances, but it must be there. The definition of culpable negligence is, therefore, correct and in a civil case makes the liability complete. But in a criminal case under the requirements of what constitutes excusable homicide the jury is obliged to find the "unlawful intent" before it can say there is no excusable homicide.

In the Horner Case,³ the court declared that under the act of 1911, before a person may escape civil liability, he is obliged to prove that he exercised "the highest degree of care." But in a criminal case he need only show that "he exercised ordinary care." The conviction was reversed because the trial judge had charged the jury that "the highest

³ *State v. Horner*, (Mo.) 180 S.W. 873.

degree of care" was necessary. The Missouri cases cited do not pass upon the "unlawful intent" in the "excusable homicide" statute, and therefore it must be presumed that the correct instruction was given with reference to an unlawful intent as in said statute.

In the Coulter Case⁴ there was a reversal of conviction because, although the court gave the correct instruction on what constitutes criminal or culpable negligence, the court charged the jury in that connection that *any act of negligence whereby one party directly brings about the death of another human being, is an act of culpable negligence of law.*

Surely there can be no negligence less than ordinary negligence. Slight negligence is ordinary negligence particular to a given situation, therefore, in the light of the Missouri statute on excusable homicide, the negligence alone is not sufficient to convict but there must be a negating of all the saving provisions in the excusable homicide statute which includes the unlawful intent.

If a man inadvertently, without unlawful intent, drop a jackknife, he is not guilty. But though he use due care, yet with an unlawful intent drop such knife, and the unlawful intent consists of a knowledge, yet a constructive knowledge, that people are beneath him and that mischief may ensue, there is the crime.

Again, at the time the Horner Case (*supra*) was tried, it was based on Section 4468 of its Statutes (Mo.).

Every other killing of a human being by the culpable negligence of another which *would be manslaughter at the common law*, and which is not excusable and justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree.

Now manslaughter at common law consists of the culpable negligence plus the unlawful intent or the converse, excusable homicide is not a defense unless what was done was without the unlawful intent.

Since then Missouri has abolished its common law manslaughter, and, as Justice Doerfler says in his opinion, it has but one degree of manslaughter.

Every killing of a human being by the act, procurement or culpable negligence of another not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter.⁵

If that be so, and manslaughter certainly may have other elements in it besides culpable negligence, they are cared for in some way in that state, other than manslaughter, and what constitutes manslaughter in

⁴ *State v. Coulter*, (Mo.) 204 S.W. 5.

⁵ Sec. 3236, Mo. Stat.

the first, second and third degrees in this state, all of which were common law manslaughter, has been taken out of the manslaughter statute in Missouri.

And as we shall see later, the excusable homicide took out of the common law definition of manslaughter the unlawful intent when it was codified and subdivided into the several degrees, and placed the "unlawful intent" into the *excusable homicide* statute.

We compare Section 3236 of the Missouri Statute with our Statute Section 4365.

The word culpable is omitted in our Statute.

Again compare Section 3236 of Missouri Statutes with our Section 4363. And also compare Missouri Section 4468, now abolished, with the foregoing Section 4363.

Section 4365 R. S. expressly defines homicide and manslaughter and it differs from the Missouri Statute. The act may be excusable homicide, the omission may be excusable homicide.

The rule of construction of a penal statute is to be resolved in favor of the person accused, and strict construction requires that where a word is capable of more than one meaning the one most favorable to the accused shall be given, providing that no violence shall be done to the natural meaning of the word.

It is a most fundamental canon of criminal legislation that a law which takes a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal.⁶

Not only is the degree of proof necessary to sustain a conviction greater than that required to maintain a civil cause of action, but also the degree of construction of words and statutes is necessarily greater.

A short history of the law of homicide and its origin not only is interesting but fully in support of our contention.

Common law punishments are abolished in this state.⁷

But common law offenses have not been abolished—merely codified—and the distinction between felonies and misdemeanors, notwithstanding Section 4637 R. S., still exists as it did in the common law.⁸

Felonies import criminal intent.

It is the actual knowledge that constitutes that element of guilt, and not mere negligence in failing to know. There cannot be a crime without criminal intent.⁹

⁶ *Nelson v. State*, 111 Wis. 394-399, 87 N.W. 235.

See also *Brown v. State*, 137 Wis. 543-548, 119 N.W. 338.

Pulp Wood Co. v. Green Bay P & F Co., 157 Wis. 604-618, 147 N.W. 1058.

⁷ Sec. 4634 R.S. Wis. Stat.

⁸ *Wilson v. State*, 1 Wis. 163-169.

⁹ *State v. Weisman*, (Mo) 225 S.W. 949-950.

And the Nebraska court adds

Specific Intent Implied. The word "feloniously" imports only that criminal intent which is the necessary part of every felony, or other crime, but they do not necessarily include the specific "purpose" to do the act which is an element of the crime charged.

Whether the indictment is on a statute or at the common law, it is a rule universal and without exception that every intent, like everything else, which the law makes an element of the offense must be alleged, for otherwise no *prima facie* case appears.¹⁰

The information in the Clemens Case charged that the defendant did feloniously kill and slay. They are the essential parts to the sufficiency of the information.¹¹

Therefore, whatever rule there may be in Missouri or elsewhere, before a conviction can be had of manslaughter in this state, the slaying and killing must be charged and proved felonious.

At common law, homicide was divided into murder and manslaughter without any reference to degrees, and the Statutes of the Territory of Wisconsin, 1839, under an act "to provide for the punishment of offenses against the lives and persons of individuals" in Section 8 thereof, on page 348, provides

That every person who shall commit the crime of manslaughter shall be punished by imprisonment in the state prison, not more than ten years nor less than one year.

And what was either justifiable or excusable homicide was left to the common law, there being no statutory provision thereon.

After the admission of Wisconsin to the Union, by Chapter 133, R. S. Laws of 1849, not only did the legislature divide murder into three degrees, but it also divided manslaughter into four degrees, Section 21 corresponding to Section 4363 under which Clemens was prosecuted, and the language is identical.

The revised statutes did not create manslaughter a crime, it existed as such before. True, the revised statutes arrange the crime of manslaughter into degrees, but this amounts to nothing more than giving the jury an additional duty, and relieving the court from a duty that before devolved upon it. The grade is to be gathered from the facts of the case canvassed by the jury.¹²

And that the statute is not a rule of pleading, but a guide to the conduct of the trial and to the instructions to be given to the jury.¹³

Section 6 of Chapter 133 of the revised statutes of 1849 (which is in the very language of section 4367) is in effect an innovation upon the

¹⁰ *Newby v. State*, 75 Neb. 33, 105 N.W. 1099-1100.
Words and Phrases, Vol. 2, p. 517.

¹¹ Sec. 4660, Wis. Stat.

¹² *Keene v. State*, 3 Pinney 99.

¹³ *Hogan v. State*, 30 Wis. 428.

common law, not merely in its codification, but particularly in its separation and division from section 4366. And the term "without unlawful intent" in section 4367, becomes, therefore, most significant.

At common law, justifiable homicide existed only when the killing occurred at the command of the king. All other homicides were either felonious or excusable.

In these instances of *justifiable* homicide, it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree, and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some *fault*, some *error* or *omission*, so trivial, however, that the law excuses it from the guilt of felony, though, in strictness, it judges it deserving of some little degree of punishment.¹⁴

And excusable homicide is there divided either *per infortunium*, by misadventure, or *se defendendo*—self-defense.¹⁵

The common law derives its doctrine of punishment and the defenses thereto from the Mosaic Code, and while Blackstone makes reference to the Roman Code, it will be seen that the Mosaic Code as later developed by the ancient rabbis and influenced by the philosophy of Christ, found its way in the formation of the common law, applicable to homicide.

Under the Mosaic Code, the overt act itself constituted the offense, and neither the law of justifiable nor excusable homicide existed, not even where a father accidentally killed his own son. If the homicide was wilful, death was the punishment. If it was accidental, he was exiled to one of the six cities of refuge, and the liberal construction placed upon the Mosaic Code which later developed the defense of excusable homicide came long after the year A.D. 1.

The Christian doctrine, as enunciated by the Nazarene, punished the *intent* as the crime. The act itself was of inconsequence.

The common law developed its code of crime and punishment out of the two concepts, i.e., that there must be an overt act as demanded in the Mosaic Code, plus the intent, the controlling element in the teachings of Christ.

The laws of the Old Testament are found in Genesis, Exodus, Leviticus, Numbers, and Deuteronomy

Exodus 21:12—He that smiteth a man, so that he die, shall be surely put to death.

Exodus 21:13—And if a man lie not in wait, but God deliver him unto his hand, then I will appoint thee a place whither he shall flee.

¹⁴ 2 Cooley's Blackstone 406.

¹⁵ 2 Cooley's Blackstone 407

And we shall see later, the Jewish Code evolved that the killing of a person under command of authority was neither the subject of death nor exile.

Exodus 22:2—If a thief be found breaking up, and be smitten that he die, there shall be no blood be shed for him.

This was the cause of much polemics as to whether the act was justifiable homicide in the sense that there should be no punishment whatever, or whether the perpetrator should be sent to exile. But later developments, both in the Mosaic Code, the Roman Code, and the common law, put this one exception into the category of justifiable homicide, equalling it with the killing under the King's command. All other killings were excusable.

Leviticus 24:17—And he that killeth any man shall surely be put to death.

Leviticus 24:20-21.

All of which reaffirm the quotation from Exodus.

Numbers 35:11—Then ye shall appoint you cities to be cities of refuge for you, that the slayer may flee thither, which killeth any person unawares.

Numbers 35:15—These six cities shall be a refuge, both for the children of Israel, and for the stranger, and for the sojourner among them, that every one that killeth any person unawares may flee thither.

The next from Numbers give instances of murder.

Numbers 35:16—And if he smite him with an instrument of iron, so that he die, he is a murderer, the murderer shall surely be put to death.

Numbers 35:17—And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer, the murderer shall surely be put to death.

Numbers 35:18—Or if he smite him with a hand weapon of wood, wherewith he may die, and he die, he is a murderer, the murderer shall surely be put to death.

Numbers 35:19-21.

While the next, also from Numbers, gives instances of commitment to a City of Refuge

Numbers 35:22—But if he trust him, suddenly without enmity, or have cast upon him anything without laying of wait.

Numbers 35:23-25.

Deuteronomy 19:5 gives us this

As when a man goeth into the wood with his neighbor to hew wood, and his hand fetched a stroke with the axe to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbor that he die, he shall flee unto one of those cities, and live.

THE CONCEPT OF JESUS

Passing to Matthew 5:38 we find

Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth, [and Matthew 5:39] But I say unto you, That ye resist not evil, but whosoever shall smite thee on thy right cheek, turn to him the other also.

Matthew 5:40-44.

And then

Matthew 6:14—For if ye forgive men their trespasses, your Heavenly Father will also forgive you.

Luke 6:29—And unto him that smiteth thee on the one cheek offer also the other, and him that taketh away thy cloak forbid not to take thy coat also.

Matthew 5:28—But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart.

Thus it may be seen from the entire reading of the New Testament that while the last quotation is with reference to the crime of adultery the intent really was the essence of every offense, the overt act being regarded as merely descriptive of the offense. A shortcoming in conduct was measured not by the gravity or its consequences, and the act as well as its expiation was measured only by the intent with which it was committed, and by the intent of the expiation invoked.

The Rabbinical Law¹⁶ later developed the doctrine of homicide, as follows

- 1) Justifiable
- 2) Misadventurous
- 3) Accidental
- 4) Culpable
- 5) Felonious

It defines "accidental homicide" as being "when it is the effect of *constructive negligence* but *entirely free from felonious intention*."

Homicide is defined as being "culpable" when it is "the result of actual negligence on the part of the perpetrator."

And so plentiful did the polemics become that, with an adroitness that equals, if not excels, that of Plato, Sophocles, and other Greek scholastics, they even draw a distinction between excusable homicide, as when a person is ascending a ladder and the material drops and causes the killing of some one passing by, an inexcusable homicide when the same fatality is caused when a person is descending a ladder.¹⁷

¹⁶ See *The Jewish Encyclopedia*, Vol. 6, p. 452.

¹⁷ Considerable discussion of that can be found in the Babylonian *Talmud* (Rodkanson), English Edition, Volume 9—Subject, Jurisprudence, Chapter 2.

The Roman Code is not very specific in its treatment of crimes, because it is usually left to the body exercising criminal jurisdiction, bound by no rules of law as to the nature of the delict or its punishment, and in Sanders' *Justiman*, American Edition, pages 493-95, it speaks merely of a wrongful killing, without any right, and of those without fault. In only one instance under the Roman Law was a design without an overt act sufficient to sustain an offense, and that was *lex Julia Majestatis*.¹⁸

So that in turning to 2 Cooley's *Blackstone* (Book IV, page 182), and reading his discussion of excusable homicide, one attains some degree of understanding of the reasons for the doctrine, and that is why the doctrine of excusable homicide was extended to exempt from punishment though some fault is involved. It may be mere negligence, a fault which, according to the dictionary, means "a slight crime or offense, blemish, defect, omission." And if an omission or neglect or fault was not within the humane exemption of excusable homicide, then we would be relegated to the ancient doctrine of the pre-common law—of punishment for the overt act alone, regardless of the intention. And may we be pardoned for saying that that is where the Clemens opinion leaves us? It excuses no omission of any kind, however unintentional, or accidental or unfortunate.

On page 182 of Cooley's *Blackstone*, Vol. 2 (Book IV), a case is cited where a person who whips a horse of another and death ensues (the horse having run over a child), he might be held for manslaughter, because the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequences.

On page 183 "If death ensues in consequence of an idle, dangerous, and unlawful sport—the slayer is guilty of manslaughter" because they are unlawful acts.

On page 18, Chapter II, Cooley's *Blackstone*, Volume 2, Book IV

Indeed, to make a complete crime cognizable by human laws, there must be *both a will and an act*.

And a little further on, after a discussion that the will to do an unlawful act alone cannot be punished—

To constitute a crime against human laws, there must be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will.

On page 21,

Where there is understanding and will sufficient, residing in the party, but not called for and exerted at the time of the action done,

¹⁸ See Sanders *Justiman*, American edition, page 588.

which is the case of all offenses committed by CHANCE or ignorance. Here the will sits neuter, and neither concurs with the act, nor disagrees to it.

At common law, murder was established by malice, express or implied. Express malice is essential to murder in the first degree. Manslaughter has all the elements of murder except that it omits malice.¹⁹

Section 4363 R. S. is, therefore, a common law manslaughter only in its lowest degree, and when on turning to section 4367 R. S., it is found that before it can be excusable, there must be an absence of unlawful intent. If mere negligence, therefore, an omission and want of ordinary care is sufficient to constitute manslaughter in the fourth degree—and ordinary negligence never includes an intent—then why must there be a negation of unlawful intent before the homicide may be excusable,—why at all in the statute of crime exemptions or defenses? The rule is just as clear that a statute of exemption must be as liberally construed as the penal statute must be strictly construed.

The trial judge and the Supreme Court both held that the death in the Clemens Case was the result of *accident and misfortune*.

Our Supreme Court has many times defined the meaning of "accident."²⁰

An accident may happen from unknown causes or be the unusual result of a known cause and unexpected to the party, thereby, in legal parlance, failing to establish the proximate cause.²¹

If an accident, though from a known cause but unforeseen, fails to make out a case of ordinary negligence, then culpable negligence must be ordinary negligence foreseen, if that is the correct definition then the death here could not have been the result of an accident or misfortune as the judge found. But he having found it was an accident, then it was unforeseen—"not the proximate cause." Where is there then culpable negligence which is ordinary negligence, inclusive of the doctrine of foreseeing?

"Accident" is the very opposite of "negligence" in law

Special verdicts have been submitted to juries, and where a jury found that the happening was the result of an accident, there ended liability

There can be no accident, there can be no misfortune which is misadventure, unless a person proceeds with usual and ordinary caution and without any unlawful intent. Were an act *malum in se*, it would not be a lawful act, nor could it be with usual and ordinary caution,

¹⁹ *State v. Blackburn*, (Del), 75 Atl. 536.

²⁰ *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28.

²¹ *Ullmann v. C. & N W R. Co.*, 112 Wis. 150, 88 N.W. 41.

but driving in excess of what is provided by statute is merely *malum prohibitum*. It could only become *malum in se* in spite of or without the statute if the driving were so reckless as almost to amount to wilfulness.

The court found that the death was the result of accident. He was doing a lawful act in driving a machine, and the operation was by lawful means, statute providing that if death is the result of an accident and misfortune, regardless of how else it might happen, then there the offense ends. Or, if he does a lawful act by lawful means with usual and ordinary caution, without any unlawful intent, the offense ends. So it is not sufficient that ordinary caution was lacking, but it must be without an unlawful intent, before the defense avails him. That is correct, because when justifiable homicide and excusable homicide were divided into two sections of our statutes, justifiable homicide never could be justifiable unless it was without the unlawful intent. To overlook that slight fault which is excusable, the law forgives the fault if the intent is not unlawful. The law never forgives the act involved in an unlawful intent.

And again, in section 3263 R.S., and the meaning of the term "culpable negligence,"—the word "culpable" can never be given the meaning of ordinary negligence, because it would be guilty of gross tautology to say "negligent negligence." If the legislature had intended the term, "ordinary negligence," it would have used such term, because 4363 R.S. was enacted at the very same time as 4367 R.S.

Webster's dictionary defines "culpable" as "deserving censure or moral blame, faulty, immoral, criminal," so that while culpable negligence in a civil action might be given the definition of fault, negligence, or deserving of censure, yet by the well established rule of construction in a criminal case, that definition most favorable to the accused must be used. Therefore, of the various synonyms, the one that defines it as "criminal" is the one that has its proper definition and place. It is not necessary here to strain a support of the Missouri doctrine, for even there culpable negligence is the culpable negligence plus the intent. The cases cited in appellant's brief 51 to 57 are again referred to as the better and safer doctrine to follow.

16 C. J., page 74.

A crime is not committed if the mind of the person committing the act is innocent.

To constitute a crime, the act must, except in the case of certain statutory crimes, be accompanied by a criminal intent or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.

It must be more than a mere omission of usual and ordinary caution.

If the legislature should adopt the suggestion of the court that the

law should be amended so as to have reference to only gross negligence, *wilful negligence*, or a reckless disregard of human life or an intent to do harm, then it would write into Section 4363 either murder in the second degree, or if the intent were clearly established, murder in the first degree.

To constitute gross negligence in such a case the act or omission causing the injury must have been wanton or wilful.²²

Wilful misconduct, so concurring, does have that effect, such wilful wrong being what is sometimes referred to as wilful, malicious or wanton, evincing intention to do an injury to another.²³

Section 4660. An indictment for murder must charge wilfully, feloniously and with malice aforethought, killed and murdered, etc.

Wilfulness may tend to establish murder in the first degree, and wantonness may be so gross as to come within murder in the second degree.

Sandar's *Justman*, page 401, page 5, discusses "culpa" in the several degrees, and on page 402,

All responsibility for *culpa* is thus set under two heads of diligence, and in the same way there are two corresponding heads of negligence, and negligence has a distinguishing mark added to it in the term *crassa*, as opposed to slight (*minima*)

There is the distinction between *diligence* and *negligence*. Diligence is the opposite of negligence.

Negligence may be the result of inadvertence, and as diligence has the element of assiduity or assiduousness, when a man lacks diligence, it cannot be said that he becomes inadvertent. Even the term "inadvertence" must be given its dual scope, depending upon whether the application is in a criminal or civil case, for inadvertence may be the result of heedlessness, and inadvertence the result of negligence. Heedlessness embodies recklessness, an element of wilful negligence.

Contributory negligence is a defense in a civil case.²⁴

Excusable homicide is a defense in a criminal prosecution.²⁵

In a civil action the burden of defense is on the defendant, but in a criminal action the burden is upon the state to overcome the defense of excusable homicide, and, since unlawful intent is one of the elements provided to be overcome, it is fatal to omit it from the consideration of the jury

²² *Kuchler v. Milwaukee E. R. & L. Co.*, 157 Wis. 107, 146 N.W. 1133.

²³ *Bolin v. C. St. P. M. & O. R. Co.*, 108 Wis. 333, 84 N.W. 446.

²⁴ *Grum v. Milwaukee Elec. Ry. & LT Co.*, 138 Wis. 44, 119 N.W. 883.

²⁵ Sec. 4367, Wis. Stats.

There is no yardstick by which it may be determined whether any given action amounts to ordinary care. The decision must, of necessity, be a matter of *human judgment*. This is signally true in automobile accidents.²⁶

Honest judgment, though faulty, has never been the subject of criminal punishment for it is of the essence of innocence.

Mere omission is not the basis for penal action.

Culpable negligence in a criminal case is of different significance. Culpable negligence will supply criminal intent.²⁷

While battery is the carrying out of the intent by the actual infliction of the injury

And if the injury occasioned by the collision resulted in death, the *culpable* driver may be justly convicted of manslaughter if the collision was caused directly by such gross carelessness as to imply an indifference to consequences, or by the commission of an unlawful act.

But the intent may be inferred from circumstances which legitimately permit it. *Intent to injure may not be implied from a lack of ordinary care.*

It is no defense to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive intention as to the consequences which, entering into the wilful, intentional act, *the law imputes to the offender, and in this way a charge which otherwise would be mere negligence, becomes by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person is recognized as an elementary principle in criminal law.*²⁸

The correct rule of what is negligence in a criminal case is stated in *State v Tankersley*²⁹ (1916)

The decisions of the courts have described in different terms the kind of negligence required to constitute crime. In some of them it is said to be negligence that is culpable and gross. In others that it must be such as to show a reckless disregard of the safety of others, etc., but all of the authorities are agreed that, in order to hold one a criminal, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue, and that, in order to a conviction of involuntary manslaughter, attributable to a negligent omission of duty, when engaged in a lawful act, it must be shown that a homicide was not improbable under all the facts existent at the time and which should reasonably have an influence and effect on the conduct of the person charged. But the omission must be one likely to cause death.

²⁶ *Shortl v. Sheill*, 172 Wis. 53, 178 N.W. 304.

²⁷ *State v. Irvine*, (La.), 52 So. 567-572.

²⁸ *Luther v. State* (Ind), 98 N.E. 641.

²⁹ *State v. Tankersley*, (N.C.), 90 S.E. 781.

On the record, therefore, defendant should not be convicted of the crime of manslaughter because of an utter absence of proof that a homicide could not have been reasonably expected to follow from anything that he did or omitted to do, and his motion to dismiss the case against him should have been allowed.

North Carolina Statutes, Section 3622

If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the County Jail or State Prison not less than four months nor more than twenty years.

This is the same as our section 8 (page 348) statutes of the Territory of Wisconsin (1839), before it was subdivided into four degrees.

If the opinion of the Supreme Court stand unreversed, then, a person who drives an automobile and through inadvertence causes the death of some one, is, of course, at once arrested and convicted of manslaughter in the fourth degree. Yet he may escape civil liability on a defense of contributory negligence.

And, to go a step farther,—if a man is fortunate enough to be able to employ a chauffeur and the chauffeur through some act of inadvertence injures some one and death ensues, the chauffeur goes to prison as a felon convicted of manslaughter in the fourth degree, while the owner of the machine escapes civil liability because of contributory negligence on the part of the person killed, and likewise, if a motorman in the city of Milwaukee in running his car, through inadvertence, causes the death of a man, woman or child, the street car company can successfully plead contributory negligence as a defense, while the motorman goes to prison as a felon notwithstanding.

And may not this conclusion be reached? If A should run his automobile into B through inadvertence, and, if B should die after a year and one day from the injury, then A would escape prosecution for manslaughter. And this, too, before he can be convicted of "assault with intent to do great bodily harm," as by section 4377, which has always been understood to merge into manslaughter in the event of death, the element of intent, though not as great as in assault with intent to kill and murder (section 4373) must be found. But should B die within the year and one day, then, under the decision, he stands convicted of manslaughter though no intent be found.

If that be correct, then the consequence and not the intent controls the degree of crime. Statutes may be enacted in which from certain omissions of duty the intent is supplied, BUT none here has been so enacted in our statutes of manslaughter.

Again, the punishment is meted out to A

First: As a punishment for his crime, but, if he be guilty of manslaughter because of accident, misfortune, or inadvertence, then he is punished not for crime but for negligent conduct.

Second. Punishment is also meted out in order to deter others, a message, so to speak, to the community, and the message goes out that others beware of accident or misfortune. What a wonderful world it would be if we were free from accident and misfortune.

For fear of being too lengthy, the writer has refrained from quoting at greater length or entering into what might seem side discussions. But it seems that in the modern every-day acceptation of the definition of crime—when we speak of a person having committed a crime, or being a criminal, with loss of citizenship—and felony means a loss of citizenship with the person's credibility as a witness forever affected—there at once comes to the mind of the ordinary person the thought that that person has some moral delinquency, some deficiency, that he has done something other than a mere negligent act, a mere omission. It would be super-refining to fasten guilt upon a person when the element of accident and misfortune is present and an unlawful intent is not found, and to thus condemn him because of some slight fault, negligence or omission, for which the law of excusable homicide was enacted,—to protect and keep within society those who were, in ancient times, sent to one of the six cities of refuge.