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CRIMINAL LAW

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EX POST FACTO LAWS

Constitutional prohibitions against ex post facto laws[1] are predicated upon the general idea that criminal laws shall not be given retroactive effect so as to subsequently make an act criminal which was legal when done, to increase the penalty after a crime has been committed, or to make any other change in the law which will operate to the detriment of the accused.[2] The broad construction usually given this prohibition is shown by the West Virginia case of *State v. Fisher*,[3] where the court held that an indeterminate sentence law, providing for possible probation after the minimum sentence was served, was ex post facto and therefore could not be applied to crimes committed before its enactment.

In *State v. Masino*[4] the Louisiana Supreme Court was confronted with two very difficult aspects of the ex post facto doctrine. Prior to the effective date of the 1942 Criminal Code, the defendant contractors had installed gas pipes in a grossly negligent manner. This negligence resulted in a leakage, and in February, 1946, the accumulation of gas under the project resulted in a violent explosion which caused the death of several persons. At the time of the defendants' negligent installation, a homicide resulting from criminal negligence would have constituted manslaughter with a maximum penalty of twenty years imprisonment. At the time of the explosion and death the Criminal Code had changed this type of involuntary manslaughter to negligent homicide,[5] carrying a maximum penalty of five years imprisonment. The defendants, who had been tried and found guilty of negligent homicide, based their appeal principally upon the argument that the application of the new negligent homicide article to them was in violation of the prohibition against ex post facto laws.

The first question was whether or not the reduction of the offense from manslaughter to negligent homicide amounted to

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1. The United States Constitution prohibits the passage of ex post facto laws by Congress and by the legislatures of the several states (U.S. Const. Art. I, § 10); Accord: La. Const. of 1921, Art. IV, § 15.

2. For a further explanation of what is meant by ex post facto laws see Calder v. Bull, 3 U.S. 386 (1798).

3. 126 W. Va. 117, 27 S.E. 2d 581 (1943).

4. 216 La. 352, 43 So. 2d 685 (1949).

5. Art. 32, La. Crim. Code of 1942.

an ex post facto law, that is, was a change detrimental to the accused. Relying largely upon the Criminal Code comment that a conviction would be easier to obtain under the new negligent homicide article than under the old crime of manslaughter, the majority of the supreme court concluded that the change was detrimental to the accused. This approach to the problem is supported by the *Fisher* case, where the possibility that a generally more liberal provision might work a detriment by inducing longer sentences was considered sufficient for application of the ex post facto doctrine.

It is further supported by a specific provision of the Louisiana Criminal Code. Article 142 states that crimes committed before the code should be governed by the law existing at the time of their commission. This article draws a definite line as to the applicability of the new crimes, which is not dependent upon whether the change effected by the Criminal Code was detrimental or beneficial within the meaning of the ex post facto prohibition.

A second and even more difficult problem which confronted the court in the *Masino* case was that of what time should control as to defendants' liability. Should it be the time of defendants' negligent act, which preceded the Criminal Code; or should it be the time when the criminal consequence (explosion resulting in death) occurred, which was several years after the effective date of the code? The majority opinion said that the time of the crime was the time of the defendants' act even though the criminal consequence occurred at a later date. The dissenting justices, on the other hand, took the view that the crime did not occur until the offense was consummated by the explosion and death. Prior to that date the defendants had been negligent, but criminal liability had not and could not have attached.

As an independent theoretical proposition it may have been more difficult to relate the criminal consequence back to the time of the defendants' act than it would have been to treat the defendants' negligence as continuing until the resultant explosion and deaths.[6] However, the decision achieves a sound practical result in holding that the defendants' criminal liability shall be measured by the law at the time *they acted* (by negligently laying the pipes), regardless of the time when the criminal consequence

6. See dissent by Justice Hawthorne, 216 La. 352, 358, 43 So. 2d 685, 687 (1949).

occurred.[7] At the same time it gives logical effect to the interrelated provisions of Article 142 of the Criminal Code and the general ex post facto prohibition. It would be unusual if, in a legal pattern so complex as that fashioned to meet the needs of the *Masino* case, there were not a few loose ends in the court's reasoning. As we strive for a more precise analysis of Justice Moise's majority opinion, we are reminded of that able jurist's poignant statement, in another troublesome case, that "It is easier to find fault with a remedy proposed than to propose a remedy that is faultless."[8]

ATTEMPTS

Prior to the adoption of the Criminal Code of 1942, Louisiana statutes provided only a random coverage of attempts to commit crimes. In the absence of a specific attempt provision, the offender who merely attempted to commit an offense was outside the ambit of criminal responsibility. Article 27, which is one of the most significant articles of the Criminal Code, provides generally for the inchoate offense of Attempt. It embraces all attempts to commit crimes, whether the intended crime be a felony or a misdemeanor. In *State v. Broadnax*[9] the supreme court upheld the application of the attempt article to a narcotic law violation, a crime which is denounced by the Narcotic Drug Act.[10] Defense counsel's argument that the attempt article should be limited to those crimes stated in the Criminal Code was squarely overruled. In holding that the article was of a general nature and applicable to *all crimes*, whether prescribed in the Criminal Code or in other statutes, the supreme court stressed the code's definition of a "crime" as "Conduct which is criminal in this Code, or *in other acts of the legislature. . . .*" The court also considered the redactor's comments, printed as footnotes to the articles by legislative direction, which show that Article 27 was intended as a general provision, punishing *all attempts* to commit crimes. In this regard, it is significant that all of the general provisions of Title I of the Criminal Code were enacted as a codification of existing general criminal law principles, but with such changes and extensions as were necessary to round out a workable pattern of substantive criminal law. The statement of a general attempt concept was one of those necessary extensions.

7. For an original and very clear exposition of this thesis, see student note to *Masino* case, 10 LOUISIANA LAW REVIEW 539 (1950).

8. State v. Masino, 214 La. 744-748, 38 So. 2d 622, 623 (1949).

9. 216 La. 1003, 45 So. 2d 604 (1950).

10. La. Act 14 of 1934 (2 E.S.), §§ 2, 20, as amended by La. Act 416 of 1948 (La. R.S. [1950] 40:962, 40:981).

MANSLAUGHTER—ILLEGAL ARREST AS PROVOCATION

In *State v. Simpson*,[11] defense counsel had requested a charge that the jury should find the defendant guilty of manslaughter, rather than murder, if they found that he killed the deceased while resisting an illegal arrest. This requested charge was predicated upon the frequently stated common law principle that an unlawful arrest "is so grievous an assault that it is regarded as sufficient provocation to reduce a homicide in resisting it to manslaughter."[12] The draftsmen of the Criminal Code found it impracticable to specify what would and what would not be sufficient provocation to reduce an intentional killing from murder to manslaughter. For example, mere insulting words, a moderate blow, or adultery with a daughter or sister, standing alone, had not usually been considered as a sufficient provocation; and yet a combination of these factors might well be sufficient to reduce the homicide to manslaughter. Similarly, while a rude unlawful arrest would ordinarily be adequate provocation, a polite and non-offensive attempt to arrest should not be sufficient to cause a sudden passion or heat of blood even though the arrest was unlawful in nature. Realizing the futility of specifying what would or what would not be adequate provocation as a matter of law, it was decided that "reasonable provocation" should be left as a jury question. Adopting this intended construction, as shown by the Reporter's Comment[13] to Article 31(1), the supreme court held that whether an illegal arrest would constitute sufficient provocation to reduce the killing to manslaughter was a question of fact for the jury.

NEGLIGENT HOMICIDE—CRIMINAL NEGLIGENCE

Negligent Homicide is defined as the killing of a human being "by criminal negligence."[14] Criminal negligence is something more than mere ordinary negligence which would impose civil liability in a wrongful death action. It has been variously characterized by common law jurisprudence and by statutes to require "gross," "wanton," "willful," and "culpable" negligence.[15]

11. 216 La. 212, 43 So. 2d 585 (1949).
12. Clark and Marshall, Law of Crimes, 314 (4 ed. 1940).
13. "*Adequate provocation*:
"In common with a majority of the statutes in other states, the proposed manslaughter article has defined the offense without a detailed enumeration of what shall or shall not be considered adequate provocation. It is a matter dependent upon so many and varying circumstances that a stereotyped classification would be impracticable. The adequacy of provocation will be primarily a jury question. . . ."
14. Art. 32, La. Crim. Code of 1942.
15. Miller, Criminal Law, 287 (1934).

Following a similar pattern, Article 12 of the Criminal Code has defined criminal negligence to require "a gross deviation below the standard of care expected to be maintained by a reasonable careful man under like circumstances." It is the general practice of trial judges to instruct juries concerning the nature of criminal negligence by reading the clear and explicit language of the definition of Article 12. Sometimes the court adds the further explanation that criminal negligence involves a high degree of carelessness and that lack of ordinary care which might support a tort action for damages will not necessarily serve as a basis of criminal liability. In *State v. Brown*,[16] a negligent homicide prosecution based upon the driving of an automobile at an unduly high rate of speed, the supreme court affirmed the trial judge's refusal to give a special charge to the jury that, "Criminal negligence is the greatest type of negligence known to law. It is more than a rashly negligent, careless, and heedless act." The requested charge, and especially the second sentence thereof, would have imposed an unjustified burden of proof upon the prosecution. The words "rashly negligent" and "heedless" are similar in meaning to the definition of criminal negligence provided in Article 12 of the Criminal Code, and it would have been clearly inaccurate to say that criminal negligence required "*more than* a rashly negligent, careless, and heedless act."

ISSUING WORTHLESS CHECKS

Issuing Worthless Checks, as defined by Article 71 of the Criminal Code, was a substantial restatement of the 1914 "bad check" statute.[17] Reporters for the Criminal Code originally proposed a definition of the offense which would have covered the giving of a worthless check in payment of an antecedent debt.[18] However, upon a suggestion of the advisory committee, they returned to the former Louisiana and usual requirement that the offender must issue the check *in exchange for something of value.* Relying upon the total absence of this element of criminal liability, the supreme court set aside a conviction of issuing a worthless check in *State v. McLean.*[19] Defendant had received delivery of a quantity of bananas. Three days later, after invoices for the purchase price were received from the seller, defendant issued his check in payment of the purchase price, knowing at the time that he did not have sufficient funds in the bank for the

16. 217 La. 373, 46 So. 2d 302 (1950).
17. La. Act 209 of 1914.
18. See Reporter's Comment to Art. 71, La. Crim. Code of 1942.
19. 216 La. 670, 44 So. 2d 698 (1950).

payment of the same. Taking the view that the unconditional delivery of the bananas without immediate payment constituted a sale on credit, the supreme court held that the issuance of the check was not "in exchange for" the bananas, but "was in payment for an antecedent debt, a transaction which Article 71 of the Criminal Code does not denounce."[20]

Justice Hamiter added, by way of dictum, "And on the issuance of the check, the vendor is not by the check defrauded; the fraud, if any, occurred when credit was extended."[21] This suggests that the state might still prosecute for Theft of the bananas under Article 67 of the Criminal Code, which covers the taking of another's property "by means of fraudulent conduct, practices, or representations," *if* they could show that the defendant had a fraudulent intent at the time possession and title to the bananas was delivered by the fruit company.[22] Such fraud at the inception of the transaction would be quite difficult to prove. At least, it could hardly be established by the mere subsequent giving of a worthless check in payment of the purchase price.

The *McLean* case, which was correctly decided under the present bad check provision, raises a question as to whether there might not be sound reasons for extending the offense so as to include the issuing of a worthless check in payment of an antecedent debt.[23]

Operation of Blind Tiger

State v. Kolb[24] involved difficult problems as to the present vitality and scope of the Blind Tiger Act.[25] Appellant had been convicted of operating a blind tiger in his drug store in dry territory. The first question presented was whether the blind tiger law had been repealed by the repeal of the state's general prohibition law, the Hood Act, in 1933.[26] It appeared to be the general judicial consensus in the ten opinions written after three hearings that the Blind Tiger Act had been dormant during 1933-1935

20. 216 La. 670, 675, 44 So. 2d 698, 700.
21. 216 La. 670, 675, 44 So. 2d 698, 699.
22. See Reporter's Comment to Art. 67, La. Crim. Code of 1942.
23. For such a provision, see Mo. Stat. Ann. (1932) 2998, § 4305.
24. 217 La. 14, 45 So. 2d 891 (1949).
25. La. Act 8 of 1914 (E.S.) (La. R.S. [1950] 26:711-713). The section providing the penalty for violations and for the disposition of beverages seized (La. R.S. [1950] 26:712) was amended and reenacted by La. Act 299 of 1950.
A "blind tiger" is defined as "any place in those subdivisions of the state in which the sale of alcoholic beverages is prohibited where such beverages are kept for sale, barter, or exchange or habitual giving away, whether in connection with a business conducted at the place or not." La. R.S. (1950) 27:711.
26. La. Act 1 of 1933 (E.S.), repealing La. Act 39 of 1921 (E.S.).

when prohibition was entirely repealed, but became operative after the enactment in 1935 of a Local Option Law,[27] under which certain parishes of the state had voted to prohibit the sale of intoxicating liquors.[28]

The second, and most controversial question in the *Kolb* case was whether a duly licensed drug store operating in dry territory can be classed as a "Blind Tiger" when intoxicating liquor is kept there for sale under a permit granted in accordance with specific provisions of the Local Option Law.[29] Both Chief Justice Fournet, writing the majority opinion after the first rehearing, and Justices Moise and LeBlanc, writing for the majority of the court after the second rehearing, took the view that the Blind Tiger Act, insofar as it now applied to those parishes which had been voted dry at local option elections, was modified by the provisions of the 1935 Local Option Act, which expressly authorized the state to grant permits or licenses to druggists for the keeping of liquor for sales for medicinal purposes pursuant to prescriptions of licensed physicians. In brief, parishes could not prohibit the sale of liquor for proper medicinal purposes under Section 2 of the latter act, and a licensed druggist could not be held to be operating a Blind Tiger when he kept intoxicating liquors in his store under a license issued under Section 3. The abuse of such permits by unlawful sales would be punishable under the appropriate section of the Local Option Law but would not, according to the court, render the drug store a "Blind Tiger."[30]

A further question may be raised as to what effect the 1948 Local Option Statute[31] may have upon the supreme court's holding in this case. The 1948 statute, which clearly supplanted and superseded the 1935 act,[32] omitted the special medicinal sale and druggist licensing permissive provisions found in the earlier statute. Possibly this may not have any effect upon the decision, since Justice Moise's majority opinion, after the second rehearing, stressed the significance of the word "blind" in the Blind

27. La. Act 17 of 1935 (1 E.S.).

28. For a very clear exposition of this issue in the case, which was more or less taken for granted by the other justices, see Justice McCaleb's majority opinion at the first hearing, 45 So. 2d 891, 892, and Justice LeBlanc's concurring opinion on the second rehearing, 45 So. 2d 891, 895.

29. La. Act 17 of 1935 (1 E.S.) §§ 2, 3.

30. 45 So. 2d 891, 893.

31. La. Act 372 of 1948 (La. R.S. [1950] 26:583-595).

32. The 1948 statute covered the same subject matter as the 1935 act, and Section 17 expressly stated, "All laws or parts of laws on the same subject matter or in conflict herewith are hereby repealed." A comparison of the two acts clearly indicates that the 1948 statute was intended to replace the 1935 statute.

Tiger Act as meaning "a surreptitious concealment or that which is not visible to the naked eye" and pointed out that there had been no concealment of intoxicating liquor by the druggist in the instant case.[33] Such a holding as to the scope and application of the Blind Tiger Act will not preclude the possibility of convictions for violation of the provisions of the Local Option Statute. The propriety of convicting a druggist under the 1948 Local Option Law for sales upon a licensed physician's prescription and for purely medicinal purposes is a matter which was not raised or decided in the *Kolb* case.

INSURANCE

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PUBLIC LIABILITY POLICIES

Notice of loss—direct action. The nature of the direct action against the insurance company originally authorized by Louisiana Act 253 of 1918 has been the subject of extended litigation.[1] As amended by Louisiana Act 55 of 1930, the statute provides for a direct action by any injured person against the defendant's insurer and states that "any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured. . . ."

In a series of decisions, the supreme court has held that the insurer could not avail itself of defenses "personal to the insured."[2] The statutory phrase quoted above was not involved, but these decisions did show a clear intention to expand the scope of the remedy available to the injured third person.

Another group of cases raised a problem which directly concerned these words. Every public liability policy contains a clause requiring the insured, as a condition of the insurer's liability, to notify the insurer of any accident. The phrasing of these clauses varies, but their general purpose is to enable the insurer as soon as possible after an accident to commence an investigation and take such other action as it may deem necessary either toward settling the claim or preparing for litigation.

33. 45 So. 2d 891, 895 (La. 1950).

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1. For a general discussion of this act, see Miller, Aspects of a Public Liability and Property Damage Policy in Louisiana, 15 Tulane L. Rev. 79 (1940).

2. See, for example, Edwards v. Royal Indemnity Ins. Co., 182 La. 171, 161 So. 191 (1935) (action by wife against husband's insurer); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1934) (action by minor children for negligence of their father resulting in death of their mother).