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# Is Section 2739m-62 of the Kentucky Statutes Constitutional?

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## NOTES

### IS SECTION 2739m-62 OF THE KENTUCKY STATUTES CONSTITUTIONAL?

Kentucky Statutes 2739m-62<sup>1</sup> says, "In addition to the penalties herein provided (for not procuring a driver's license), if any driver involved in any accident resulting in any damage whatsoever to person or to property shall be ineligible to procure operator's license herein provided for, or being eligible therefor shall have failed to procure said operator's license, or having procured same yet at the same time of such accident same shall have been suspended or revoked, he shall be deemed *prima facie* negligent in causing or contributing to cause such accident."

It is the purpose of this paper to examine that section of the statutes, passed as a part of the Uniform Operator's License Act, and to determine its scope, extent, effect, and constitutionality. To do this we must first look at what is meant by the term, "prima facie negligent".

The Court of Appeals of Kentucky has dealt with this phrase many times. In *Price v. Commonwealth*<sup>2</sup> it said, "A legislative body in making a law may provide what shall be a *prima facie* case, and may place upon the defendant, in case a violation of the law is shown, the burden of showing that the case falls within the exceptions named in the ordinance."

Again, in *Adams Express Co. v. Huntley*,<sup>3</sup> the court said, "When a car in which stock is shipped breaks down, the breaking of the car makes out a *prima facie* case of negligence against the carrier and warrants recovery if there is nothing in the record to overcome the presumption of negligence."

Again, in *Flynn v. Barnes*,<sup>4</sup> the court used these words, "It is only necessary in a pleading that the plaintiff shall state facts showing a *prima facie* case, and where the plaintiff shows that he was examined by the school board, it will be presumed

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<sup>1</sup> Ky. Acts, 1936—3rd ex. ses., chap. 13.

<sup>2</sup> 123 Ky. 163, 94 S. W. 32 (1906).

<sup>3</sup> 145 Ky. 7, 139 S. W. 1084 (1911).

<sup>4</sup> 156 Ky. 498, 161 S. W. 523 (1913).

that the officers did their duty, and that he was sworn before he was examined as required by statute.’’

And in *Moore v. Hart*,<sup>5</sup> the court said, ‘‘Subsection 9 of section 2739 of the statutes makes it *prima facie* evidence of negligence to run an automobile exceeding 15 miles per hour upon any highway of the state . . . (when passing through a town). Under the statute, if a collision should occur, the plaintiff would make out his case, after proving the fact of the collision followed by the injury, by showing that the speed of the defendant’s car was more than 15 miles an hour.’’

Thus it is seen that the effect of the statute in question is to raise a presumption in favor of the plaintiff in such a case. When, after showing the accident and the injury, the plaintiff has proved that the defendant was operating his car without a driver’s license, he may rest and prove nothing else. Then the defendant has to prove that the accident was not the result of his not having a license, rather than having the plaintiff prove that it was the result of this omission. A substantive right of the defendant is affected. Where, under a certain set of facts, the only evidence, other than the accident and injury, presented by either party would be that defendant had no license to operate an automobile, the plaintiff would recover.

Or, in the words of Wigmore, *prima facie* means a presumption. ‘‘And the effect of a presumption is to prove sufficient facts for the one to whom the benefit of the presumption accrues that he is relieved of the duty of proving anything else but the facts which give rise to the presumption, and then he may rest and the burden of going forward shifts to the adversary. If the adversary fails in his proof to present sufficient evidence to rebut the presumption, the verdict goes against him.’’<sup>6</sup> The statute has raised, in effect, a duty to procure a driver’s license owing from every driver to every other person lawfully using the highways, as a protection for the other users of the roads. And for violation of this duty, the offender is negligent.

This, then, is a measure which most logically seems to have been passed under the police power of the state. As the Court

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<sup>5</sup> 171 Ky. 725, 188 S. W. 861 (1916). And see also, *Cincinnati, N. O. & P. T. Ry. Co. v. Smith and Johnston*, 155 Ky. 481, 159 S. W. 937 (1913); *Gambill v. Com.*, 142 Ky. 312, 134 S. W. 160 (1910).

<sup>6</sup> 5 Wigmore, *Evidence* (2nd ed., 1923) 2494, and cases cited note 17, p. 459.

of Appeals said in the case of *Commonwealth v. Reimecke Coal Mining Co.*,<sup>7</sup> "the subjects for the exercise of the police power are, first, preservation of the public health; second, preservation of the public morals; third, regulation of business enterprises; fourth, regulation of civil rights of individuals; and, fifth, the general welfare and safety of the citizens."

Again, in *City of Newport v. Merkel Bros.*,<sup>8</sup> the court said, "The legislature can, in the exercise of the police power, regulate the use and driving of motor vehicles." And further, "The police power of a state may be called into play when it is necessary to protect the public health or public morals or public safety".<sup>9</sup>

But now let us pause a minute to look at the Constitution of the state of Kentucky. Section 80, in providing that the governor of the state may call special sessions of the General Assembly, also provides that, "When he shall convene the general assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered."<sup>10</sup>

The Uniform Operator's License Act, of which Kentucky Statute section 2739m-62 is a part, was passed at a special session of the General Assembly called by the Governor in March, 1936. The proclamation of the Governor in relation to this session is, in substance, as follows:

"Whereas, the budgetary needs of the several departments, boards, commissions and agencies of the government of Kentucky for the two years beginning July 1, 1936, have not yet been determined by the General Assembly of the Commonwealth of Kentucky; and

Whereas, such budgetary needs must be determined before the amount of revenue to meet such needs can be ascertained:

Now, therefore, In order to determine the budgetary needs of the several departments . . . I . . . do issue this, my proclamation . . . convening the General Assembly of Kentucky in Extraordinary Session . . . for the sole purpose of considering the following subject:

1) To consider, determine and prepare a budget which will meet the needs of the several departments . . . for a period of two years from July 1, 1936, and only said subject."<sup>11</sup>

<sup>7</sup> 117 Ky. 885, 894, 79 S. W. 287 (1904).

<sup>8</sup> 156 Ky. 580, 161 S. W. 549 (1913).

<sup>9</sup> *Com. v. Smith*, 163 Ky. 227, 173 S. W. 340 (1915). And see also, *Loftus v. Iowa*, 211 Iowa 566, 232 N. W. 412 (1930); *Com. v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851); *Davis v. State*, 26 Ohio App. 340, 159 N. E. 575, 576 (1927); *State v. Peel Splint Coal Co.*, 36 W. Va. 324, 15 S. E. 1000 (1892).

<sup>10</sup> Kentucky Constitution, sec. 80.

<sup>11</sup> Ky. Acts, 1936—3rd ex. ses. (preface).

The Uniform Operator's License Act was chapter 13 of the Kentucky Acts passed at this session, which was called as seen above for the purpose of producing revenue to meet the budget for the two years following July 1, 1936. And section 33 of this act proclaimed:

**"EMERGENCY:**

Whereas, the present state revenue does not meet the immediate needs of the maintenance of the State government, its agencies and subdivisions, an emergency is declared to exist and this Act shall become a law on August 1, 1936."<sup>12</sup>

And the Uniform Operator's License Act as a whole has been held valid by the Kentucky Court of Appeals.<sup>13</sup> But since the Kentucky Constitution before cited states that only such laws as are within the purview of the call of the governor in convening an extra session of the General Assembly may be passed, and the Court of Appeals has held unconstitutional laws passed at such sessions which were not within this purpose,<sup>14</sup> it follows that the Kentucky Uniform Operator's License Act is a revenue measure. If it is not a revenue measure, the Court of Appeals would be in error in holding it constitutional. So, if this act were a measure designed to protect the safety of the citizens, coming under the police power, it, and section 2739m-62 must fall as being contrary to the provisions of section 80 of the Kentucky Constitution.

If, then, the Uniform Operator's License Act is constitutional, it must be a revenue measure pure and simple, and is not an exercise of the police power of the state as it has been defined by the Kentucky Court of Appeals.

And, being a revenue measure, it can raise no duty owing from one citizen to another, the breach of which will constitute negligence.<sup>15</sup> As has been shown, this is a proper function of the police power only. Unless a statute was passed with the intention of creating such a duty, breach of that statute is not negligence.<sup>16</sup>

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<sup>12</sup> Ky. Acts, 1936—3rd ex. ses., ch. 13, p. 151.

<sup>13</sup> Com. v. Burnett, 274 Ky. 231, 118 S. W. (2d) 558 (1938).

<sup>14</sup> Richmond v. Lay, 261 Ky. 138, 87 S. W. (2d) 134 (1935).

<sup>15</sup> Moore v. Hart, 171 Ky. 725, 188 S. W. 861 (1916); Fenton Dry Cleaning & Dyeing Co. v. Hamilton, 226 Ky. 580, 11 S. W. (2d) 409 (1928); Prichard v. Collins, 228 Ky. 635, 15 S. W. (2d) 497 (1929).

<sup>16</sup> Harper, Torts (1933), sec. 78. And see *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28 (1913); *Hemming v. New Haven*, 82 Conn. 661, 74 Atl. 892, 25 L. R. A. (N. S.) 734 (1910); *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 80 Atl. 523, 35 L. R. A. (N. S.) 699 (1911); *Black v. Moree*,

Therefore, the writer has come to the conclusion that section 2739m-62 of the Kentucky Statutes is unconstitutional, on either of two grounds. First, if the Uniform Operator's License Act was passed as an exercise of the police power, the entire act and this particular section with it must fall as being contrary to section 80 of the Kentucky Constitution. Or, second, if the Uniform Operator's License Act as a whole is constitutional, it is a revenue measure not passed under the police power and cannot raise a duty owing from one citizen to another to protect him; so this section attempting to create such a duty is invalid.

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135 Tenn. 73, 135 S. W. 682, L. R. A. 1916 E, 1216 (1916); *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760 (1917); notes 43 A. L. R. 1153, 54 A. L. R. 374, 61 A. L. R. 1190.