

THE QUEEN v. DUDLEY AND STEPHENS.

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Dec. 9.

Criminal Law—Murder—Killing and eating Flesh of Human Being under Pressure of Hunger—"Necessity"—Special Verdict—Certiorari—Offence on High Seas—Jurisdiction of High Court.

A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life.

At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners D. and S., seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1000 miles from land; that on the eighteenth day, when they had been seven days without food and five without water, D. proposed to S. that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D., with the assent of S., killed the boy, and both D. and S. fed on his flesh for four days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation:—

Held, that upon these facts, there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder.

INDICTMENT for the murder of Richard Parker on the high seas within the jurisdiction of the Admiralty.

At the trial before Huddleston, B., at the Devon and Cornwall Winter Assizes, November 7, 1884, the jury, at the suggestion of the learned judge, found the facts of the case in a special verdict which stated "that on July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. That in this boat they had no supply of water and no supply of food, except two 11b. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small

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turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and was probably more than 1000 miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted. That on the 24th of July, the day before the act now in question, the prisoner Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; that the three men fed upon the body and blood of the boy for four days; that on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration. That they were carried to the

port of Falmouth, and committed for trial at Exeter. That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court thereupon, and if upon the whole matter the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment."

The learned judge then adjourned the assizes until the 25th of November at the Royal Courts of Justice. On the application of the Crown they were again adjourned to the 4th of December, and the case ordered to be argued before a Court consisting of five judges.

Dec. 4. *Sir H. James, A.G. (A. Charles, Q.C., C. Mathews, and Danckwerts, with him),* appeared for the Crown.

The record having been read,

A. Collins, Q.C. (H. Clark, and Pyke, with him), for the prisoners, objected, first, that the statement in the verdict that the yacht was a registered British vessel, and that the boat in which the prisoners were belonged to the yacht, was not part of any finding by the jury; secondly, that the formal conclusion of the verdict, "whether upon the whole matter the prisoners were and are guilty of murder, the jury are ignorant," &c., was also no part of the finding of the jury, as they simply found the facts relating to the death of Parker, and nothing else was referred to them;

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thirdly, that the record could not be filed, for it had been brought into the court by order only, and not by certiorari.

Sir H. James, A.G., for the Crown. As to the first point, the Crown are willing that the statement that the yacht was a registered British vessel, and that the boat belonged to the yacht, should be struck out of the record. With regard to the conclusion of the verdict it is according to the form of special verdicts in the Reports: *Rex v. Pedley* (1); *Rex v. Oneby* (2); *Mackally's Case* (3); *Hazel's Case*. (4) As for the certiorari there was no necessity for it, for the Court of Assize is now part of this Court.

[THE COURT intimated that the points taken on behalf of the prisoners were untenable.]

With regard to the substantial question in the case—whether the prisoners in killing Parker were guilty of murder—the law is that where a private person acting upon his own judgment takes the life of a fellow creature, his act can only be justified on the ground of self-defence—self-defence against the acts of the person whose life is taken. This principle has been extended to include the case of a man killing another to prevent him from committing some great crime upon a third person. But the principle has no application to this case, for the prisoners were not protecting themselves against any act of Parker. If he had had food in his possession and they had taken it from him, they would have been guilty of theft; and if they killed him to obtain this food, they would have been guilty of murder. The case cited by Puffendorf in his *Law of Nature and Nations*, which was referred to at the trial, has been found, upon examination in the British Museum, in the work of Nicolaus Tulpius, a Dutch writer, and it is clear that it was not a judicial decision. (5)

[He was stopped.]

(1) Leach, C. C. 242.

(2) 2 Ld. Raym. 1485.

(3) 9 Co. 65 b.

(4) Leach, C. C. 368.

(5) HUDDLESTON, B., stated that the full facts of the case had been discovered by Sir Sherston Baker, a member of the Bar, and communicated to him as follows:—

A Dutch writer, Nicolaus Tulpius,

the author of a Latin work, *Observationum Medicarum*, written at Amsterdam in 1641, states that the following facts were given him by eye-witnesses. Seven Englishmen had prepared themselves in the Island of St. Christopher (one of the Caribbean Islands) for a cruise in a boat for a period of one night only, but a storm drove them so far out to sea that they could not get

A. Collins, Q.C., for the prisoners. The facts found on the special verdict shew that the prisoners were not guilty of murder, at the time when they killed Parker, but killed him under the pressure of necessity. Necessity will excuse an act which would otherwise be a crime. Stephen, Digest of Criminal Law, art. 32, Necessity. The law as to compulsion by necessity is further explained in Stephen's History of the Criminal Law, vol. ii., p. 108, and an opinion is expressed that in the case often put by casuists, of two drowning men on a plank large enough to support one only, and one thrusting the other off, the survivor could not be subjected to legal punishment. In the American case of *The United States v. Holmes* (1), the proposition that a passenger on board a vessel may be thrown overboard to save the others is sanctioned. The law as to inevitable necessity is fully considered

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back to port before seventeen days. One of them proposed that they should cast lots to settle on whose body they should assuage their ravenous hunger. Lots were cast, and the lot fell on him who had proposed it. None wished to perform the office of butcher; and lots were again cast to provide one. The body was afterwards eaten. At length the boat was cast on the shore of the Isle of St. Martin, one of the same group, where the six survivors were treated with kindness by the Dutch, and sent home to St. Christopher.

The principal passages in the original are as follows:—

“ . . . Horribilis illa tragœdia quam non ita pridem conspexit India Occidentalis in septem Britannis; quibus necessitas famem fecit undecim dierum. Velut nobis sincere relatum, a testibus oculatis qui hæc ipsa ventorum ludibria et humaniter navibus suis excipere, et officiosè ad suos reduxere, septem Britanni accinxerant se in insulâ Christophorianâ unius solummodo noctis itineri, ultrâ quam etiam non extenderant commeatum. At interveniens tempestas abripuit imparatos longius in mare quam ut potuerint

reverti ad portum destinatum ante diem septimum decimum. . . . Cujus intracti erroris, nullum finem promittente spatioso mari, adigebantur tandem (O durum necessitatis telum!) ancipiti sorti committere, cujus carne urgentem famem, et quo sanguine compercerent inexplebilem sitim. Sed jacta alea (quis eventum hunc non miretur!) destinabit primæ cædi primum hujus lanienæ auctorem. . . . Quâ oratione ut non parum lenivit horrendi facinoris atrocitatem, sic erexit utique usque eò flaccidos ipsorum animos: ut tandem reperiretur aliquis, sorte tamen priusductus qui petierit animose perorantis jugulem, et intulerit vim volenti. Cujus cadaveris expetiit quilibet illorum tam præproperè frustum, ut vix potuerit tam festinanter dividi.

“ . . . At tandem misertus hujus erroris Deus deduxit ipsorum naviculam ad insulam Martiniam in quâ à præsidio Belgico et humaniter excepti, et benignè ad suos reducti fuere. Sed vix attigerant terram quin accusarentur protinus a præstore homicidii. Sed diluente crimen inevitabili necessitate, dedit ipsis brevem veniam ipsorum judex.”

(1) 1 Wallace, Jun. 25.

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in Russell on Crimes, vol. i. p. 847, and there are passages relating to it in Bracton, vol. ii. p. 277; Hale's Pleas of the Crown, p. 54 and c. 40; East's Pleas of the Crown, p. 221, citing Dalton, c. 98, "Homicide of Necessity," and several cases, amongst others *McGrowth's Case* (1); *Stratton's Case* (2). Lord Bacon, Bac. Max., Reg. 5, gives the instance of two shipwrecked persons clinging to the same plank and one of them thrusting the other from it, finding that it will not support both, and says that this homicide is excusable through unavoidable necessity and upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish. It is true that Hale's Pleas of the Crown, p. 54, states distinctly that hunger is no excuse for theft, but that is on the ground that there can be no such extreme necessity in this country. In the present case the prisoners were in circumstances where no assistance could be given. The essence of the crime of murder is intention, and here the intention of the prisoners was only to preserve their lives.

Lastly, it is not shewn that there was jurisdiction to try the prisoners in England. They were part of the crew of an English yacht, but for anything that appears on the special verdict the boat may have been a foreign boat, so that they were not within the jurisdiction of the Admiralty: *Reg. v. Keyn*. (3) The indictment is not upon the Act 17 & 18 Vict. c. 104, for an offence committed by seamen employed or recently employed in a British ship. The special verdict cannot be amended in a capital case by stating the real facts.

Sir H. James, A.G., for the Crown.

[LORD COLERIDGE, C.J. The Court are of opinion that the conviction must be affirmed. What course do you invite us to take?]

To pronounce judgment and pass sentence. This was the practice even when, as formerly, the record was removed by certiorari: *Rex v. Royce* (4); *Rex v. Athos* (5); *Rex v. Cook*. (6)

THE COURT intimated that judgment would be given on December 9th.

(1) 18 How. St. Tr. 391.
 (2) 21 How. St. Tr. 1223.
 (3) 2 Ex. D. 63.

(4) 4 Burr. 2073.
 (5) 8 Mod. 136.
 (6) 4 M. & S. 71.

Dec. 9. The judgment of the Court (Lord Coleridge, C.J., Grove and Denman, JJ., Pollock and Huddleston, BB.) was delivered by

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LORD COLERIDGE, C.J. The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th of July in the present year. They were tried before my Brother Huddleston at Exeter on the 6th of November, and, under the direction of my learned Brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment.

The special verdict as, after certain objections by Mr. Collins to which the Attorney General yielded, it is finally settled before us is as follows. [His Lordship read the special verdict as above set out.] From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned Brother's notes. But nevertheless this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving *him* of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy they would *probably* not have survived," and that "the boy being in a much weaker condition was *likely* to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, those who killed him. Under these circumstances the jury say that they are ignorant whether those who killed him were guilty of murder, and have referred it to this Court to

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determine what is the legal consequence which follows from the facts which they have found.

Certain objections on points of form were taken by Mr. Collins before he came to argue the main point in the case. First it was contended that the conclusion of the special verdict as entered on the record, to the effect that the jury find their verdict in accordance, either way, with the judgment of the Court, was not put to them by my learned Brother, and that its forming part of the verdict on the record invalidated the whole verdict. But the answer is twofold—(1) that it is really what the jury meant, and that it is but the clothing in legal phraseology of that which is already contained by necessary implication in their unquestioned finding, and (2) that it is a matter of the purest form, and that it appears from the precedents with which we have been furnished from the Crown Office, that this has been the form of special verdicts in Crown cases for upwards of a century at least.

Next it was objected that the record should have been brought into this Court by certiorari, and that in this case no writ of certiorari had issued. The fact is so; but the objection is groundless. Before the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), as the courts of Oyer and Terminer and Gaol delivery were not parts of the Court of Queen's Bench, it was necessary that the Queen's Bench should issue its writ to bring before it a record not of its own, but of another Court. But by the 16th section of the Judicature Act, 1873, the courts of Oyer and Terminer and Gaol delivery are now made part of the High Court, and their jurisdiction is vested in it. An order of the Court has been made to bring the record from one part of the court into this chamber, which is another part of the same court; the record is here in obedience to that order; and we are all of opinion that the objection fails.

It was further objected that, according to the decision of the majority of the judges in the *Franconia Case* (1), there was no jurisdiction in the Court at Exeter to try these prisoners. But (1) in that case the prisoner was a German, who had committed the alleged offence as captain of a German ship; these prisoners were English seamen, the crew of an English yacht, cast away in

(1) 2 Ex. D. 63.

a storm on the high seas, and escaping from her in an open boat ; (2) the opinion of the minority in the *Franconia Case* (1) has been since not only enacted but declared by Parliament to have been always the law ; and (3) 17 & 18 Vict. c. 104, s. 267, is absolutely fatal to this objection. By that section it is enacted as follows :—“ All offences against property or person committed in or at any place either ashore or afloat, out of her Majesty's dominions by any master seaman or apprentice who at the time when the offence is committed is or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England.” We are all therefore of opinion that this objection likewise must be overruled.

There remains to be considered the real question in the case—whether killing under the circumstances set forth in the verdict be or be not murder. The contention that it could be anything else was, to the minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to. First it is said that it follows from various definitions of murder in books of authority, which definitions imply, if they do not state, the doctrine, that in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or any one else. But if these definitions be looked at they will not be found to sustain this contention. The earliest in point of date is the passage cited to us from Bracton, who lived in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeve tells us, because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling, but the passage upon homicide, on which reliance is placed,

(1) 2 Ex. D. 63.

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is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal, and the crime of murder, it is expressly declared, may be committed "linguâ vel facto"; so that a man, like Hero "done to death by slanderous tongues," would, it seems, in the opinion of Bracton, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense—the repelling by violence, violence justified so far as it was necessary for the object, any illegal violence used towards oneself. If, says Bracton, the necessity be "evitabilis, et evadere posset absque occisione, tunc erit reus homicidii"—words which shew clearly that he is thinking of physical danger from which *escape* may be possible, and that the "inevitabilis necessitas" of which he speaks as justifying homicide is a necessity of the same nature.

It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justified homicide is that only which has always been and is now considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony" (1 Hale's Pleas of the Crown, p. 491). Again, he says that "the necessity which justifies homicide is of two kinds: (1) the necessity which is of a private nature; (2) the necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard, and this takes in these inquiries:—(1.) What may be done for the safeguard of a man's own life;" and then follow three other heads not necessary to pursue. Then Lord Hale proceeds:—"As touching the first of these—viz., homicide in defence of a man's own life, which is usually styled *se defendendo*." It is not possible to use words more clear to shew that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called "self-defence." (Hale's Pleas of the Crown, i. 478.)

But if this could be even doubtful upon Lord Hale's words, Lord

Hale himself has made it clear. For in the chapter in which he deals with the exemption created by compulsion or necessity he thus expresses himself:— “If a man be desperately assaulted and in peril of death, and cannot otherwise escape unless, to satisfy his assailant’s fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact, for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life the law permits him in his own defence to kill the assailant, for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector cum debito modamine inculpatæ tutelæ.” (Hale’s Pleas of the Crown, vol. i. 51.)

But, further still, Lord Hale in the following chapter deals with the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or clothing; “theft is no theft, or at least not punishable as theft, as some even of our own lawyers have asserted the same.” “But,” says Lord Hale, “I take it that here in England, that rule, at least by the laws of England, is false; and therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and animo furandi steal another man’s goods, it is felony, and a crime by the laws of England punishable with death.” (Hale, Pleas of the Crown, i. 54.) If, therefore, Lord Hale is clear—as he is—that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder?

It is satisfactory to find that another great authority, second, probably, only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster, in the 3rd chapter of his Discourse on Homicide, deals with the subject of “homicide founded in necessity”; and the whole chapter implies, and is insensible unless it does imply, that in the view of Sir Michael Foster “necessity and self-defence” (which he defines as “opposing force to force even to the death”) are convertible terms. There is no hint, no trace, of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it.

In East’s Pleas of the Crown (i. 271) the whole chapter on homicide by necessity is taken up with an elaborate discussion of

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the limits within which necessity in Sir Michael Foster's sense (given above) of self-defence is a justification of or excuse for homicide. There is a short section at the end very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them, and the conclusion is left by Sir Edward East entirely undetermined.

What is true of Sir Edward East is true also of Mr. Serjeant Hawkins. The whole of his chapter on justifiable homicide assumes that the only justifiable homicide of a private nature is the defence against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with the significant expression from a careful writer, "*It is said* to be justifiable." So, too, Dalton c. 150, clearly considers necessity and self-defence in Sir Michael Foster's sense of that expression, to be convertible terms, though he prints without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own. And there is a remarkable passage at page 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him even in self-defence, "*cuncta prius tentanda.*"

The passage in Staundforde, on which almost the whole of the dicta we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton, shewing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. Russell merely repeats the language of the old text-books, and adds no new authority, nor any fresh considerations.

Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the Bar, who communicated with my Brother Huddleston, to convey the authority (if it conveys so much) of a single judge

of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case cited by my Brother Stephen in his Digest, from Wharton on Homicide, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my Brother Stephen says, be an authority satisfactory to a court in this country. The observations of Lord Mansfield in the case of *Rex v. Stratton and Others* (1), striking and excellent as they are, were delivered in a political trial, where the question was whether a political necessity had arisen for deposing a Governor of Madras. But they have little application to the case before us, which must be decided on very different considerations.

The one real authority of former time is Lord Bacon, who, in his commentary on the maxim, "necessitas inducit privilegium quoad jura privata," lays down the law as follows:—"Necessity carrieth a privilege in itself. Necessity is of three sorts—necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First of conservation of life; if a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable." On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others, the

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(1) 21 How. St. Tr. at p. 1223.

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equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day.

There remains the authority of my Brother Stephen, who, both in his Digest and in his History of the Criminal Law, uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary, we must with true deference have differed from him, but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which if he had been a member of the Court he would have been unable to agree. Neither are we in conflict with any opinion expressed upon the subject by the learned persons who formed the commission for preparing the Criminal Code. They say on this subject:—

“We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.”

It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and if not, in what way they should be amended, but as it is we have, as they say, “to apply the principles of law to the circumstances of this particular case.”

Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be

justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. "Necesse est ut eam, non ut vivam," is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more

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necessary to kill him than one of the grown men? The answer must be "No"—

"So spake the Fiend, and with necessity,
The tyrant's plea, excused his devilish deeds."

It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder. (1)

THE COURT then proceeded to pass sentence of death upon the prisoners. (2)

Solicitors for the Crown: *The Solicitors for the Treasury.*

Solicitors for the prisoners: *Irvine & Hodges.*

(1) My brother Grove has furnished me with the following suggestion, too late to be embodied in the judgment but well worth preserving: "If the two accused men were justified in killing Parker, then if not rescued in time, two of the three survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving."—C.

(2) This sentence was afterwards commuted by the Crown to six months' imprisonment.

A. P. S.