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Necessity as a Defence in Criminal Cases

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10. Complaints, petitions, answers, and all communications shall be made to the Board and sent to the Secretary.

NECESSITY AS A DEFENCE IN CRIMINAL CASES—The wreck of the Vestris has been followed, as such disasters usually are, by conflicting stories as to the behavior of the members of the crew and the passengers under the extreme pressure of the circumstances to which they were subjected. These stories have revived interest and renewed speculation as to the existence and scope of "necessity" as a defence in criminal cases.

It has been stated as a general rule that "an act which would otherwise constitute a crime is justifiable or excusable if done under necessity."[1] *Necessitas non habet legem.* The term "necessity" is used, however, to describe two distinct defences: (1) Physical impossibility or necessity; and (2) the extreme pressure of circumstances.[2] The treatment of these two defences as if they were the same is one of the oldest "fallacies of the law".[3]

The theory of the first defence, which has been said to be "true necessity", is that an act cannot be a crime if it is purely involuntary, *i. e.,* if the doing of the act in question in no degree depended upon the wish or desire of the person charged with doing it.[4] It may be defined as existing whenever the act complained of does not depend in any (even the slightest) degree upon the wish or desire of the person whose conduct is in question.[5] In such cases "as the party is mentally passive, it cannot be said that he acts."[6] "The prima facie agent is not really the agent at all, but the instrument or means."[7]

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[1]16 C. J. 91.

[2]Clark and Marshall on Crimes, 3rd ed. sec. 68; May's Criminal Law, 3rd ed. sec. 66.

[3]The Eliza Lines, (1905) 199 U. S. 119, 130, per Holmes, J.

[4]"There may be cases of true necessity where the volition of the defendant has no share in the result". May's Criminal Law, 3rd ed. sec. 68. "The law does not require the impossible. If a man, seeing his duty, has, to the best of his ability endeavored to perform it, the law will not visit punishment upon his failure from inability." Rood, Criminal Law, p. 59.

[5]Stroud, Mens Rea, p. 188. "If under circumstances which allow no possibility of choice, one is compelled to do a prohibited act, he is not punishable for no crime is committed." 13 Harvard Law Review, p. 411.

[6]Austin, Jurisprudence, p. 1060 n.

[7]Clark, Analysis of Criminal Liability, p. 33.

The propriety of this defence has been asserted in a variety of cases.[8] Hale gave an illustration which has become classic: "If there be an actual forcing of a man, as if A by force takes the arm of B and the weapon in his hand, and therewith stabs C, whereof he dies; this is murder in A but B is not guilty."[9] The defence is not, however, confined to cases of compulsion by human agencies. The inevitable necessity may arise from natural causes—from the surrounding circumstances.[10] As to this defence, "there can be no doubt."[11] It differs from the second defence in the fact that in this defence the volition of the defendant has no share in the result. The circumstances must be such that no room is left, so far as the defendant is concerned, for wish or desire of any kind, as determining the conduct complained of. If there be any room for choice of action, the defence ceased to be one of "true necessity" and becomes one of the "extreme pressure of circumstances."[12]

The pressure of circumstances upon a person may be so great as to justify him for doing an act which, but for such pressure, would be a crime.[13] The idea underlying this defence is that the fact that one who inflicted harm upon another's person or property or the public, did so for the purpose of avoiding some greater evil to himself, may constitute a defence. Occasions for invoking this defence arise where a person is reduced to a choice of evils. He is so situated that in order to escape what he dislikes most, he must do something which he dislikes less, altho he may dis-

[8]Stroud, Mens Rea. p. 188.

[9]Hale Historia Placitorum Coronal, p. 433.

[10]The following cases illustrate this defence. Reg. v. Bamber 5 Q. B. 279, (1843) 114 Eng. Reprint 1254; C. v. Brooks 99 Mass., 434 (1868); C. v. N. Y. C. R. R. 202 Mass. 394, (1909) 88 N. E. 764, 16 Am. Cas. 587; C. & O. R. R. v. C. 119 Ky. 519, (1905) 84 S. W. 566

[11]McClain, Criminal Law, sec. 136.

[12]"The difference between the two is the difference between an act and no act. The distinction is well settled in the parallel instance of duress by threats, as distinguished from overmastering physical force applied to a man's body and imparting to it the motion sought to be attributed to him. In the former case there is a choice and therefore an act, no less when the motive is commonly recognized as very strong or even generally overpowering, than where it is one which would affect the particular person only and not the public at large". The Eliza Lines 199 U. S. 119, 130, (1905) per Holmes, J.

[13]In Reg. v. Dudley L. R., 14 Q. B. Div. 273, (1884) Coleridge, C. J., said that this "was not what the law has ever called 'necessity'. It is sometimes called 'extreme benefit' or 'extreme need'."

like extremely what he determines to do. There is a choice, although it may be a choice between extreme evils.[14] The so-called "necessity" here contemplated resides not in the act itself, but in the external conditions which surround the actor when the act is performed. The question presented when this defence is raised is whether the purpose of avoiding an injury threatened to one's self or another will serve as an excuse for doing an act which would otherwise be criminal.[15]

The defence has been recognized in civil cases from earliest times.[16] It would seem that it should be more readily admissable in criminal cases than in civil cases because: (1) The object of the former is not to compensate for loss, but to punish guilt, which seems to be almost entirely absent; (2) punishment and the threat thereof must fail to accomplish its great object, deterrence, where the evil which it threatens is less than that which would have been suffered if the alleged criminal act had not been committed.[17]

The defence is "one of the curiosities of the law."[18] The law upon it is extremely scanty and vague. It is recognized in some systems other than the common law, even to the extent of recognizing the right of an innocent person to protect himself in extreme emergencies by the sacrifice of those who are also innocent.[19] The French Penal Code provides that there is neither crime nor offense when the defendant has been constrained by a force which he could not resist *(contraint par une force a la quelle il n'a pu resister.)*[20] In a recent case in Germany it appeared that a

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[14]Stephen, History of Criminal Law, vol. 2, p. 102.

[15]Robinson's Elementary Law, 2nd ed. p. 533.

[16]Pollock on Torts, 6th ed. p. 168; 13 Harvard Law Review, p. 599; 23 Harvard Law Review 599; 17 Dickinson Law Review, p. 168; Owen v. Cook 9 N. D. 134, (1899) 81 N. W. 285; Gregson v. Gilbert 3 Douglas 232.

[17]Henny, Criminal Law, 11th ed. p. 74. This is especially true where death is the immediate consequence of refraining from doing the criminal act.

[18]Stephen, History of Criminal Law, vol. 2, p. 108.

[19]Robinson, Elementary Law, 2nd ed. p. 534.

[20]The manner in which the French law deals with cases of "physical constraint", "moral constraint" and "necessity" is set forth by Garcon, Code Penal, vol. 1, pp. 176-182. See also Moriand's able monograph, Le Delit Necessaire. See also the Italian Penal Code, sec. 49, and the German Penal Code, sec. 54.

teacher of athletics and her escort, a merchant, were riding in a row boat on a lake, when a sudden storm arose which caused the boat to leak. The teacher, who was the stronger of the two, pushed her male friend into the water in order to save herself. He was drowned. The girl was rescued and tried for manslaughter. The German Supreme Court applied the provision of the German Code to the effect that anybody who, in order to save his own life or that of a near relative, kills another is not guilty, and acquitted the girl.

The English authorities are not numerous. Stephen declared that the subject was one "on which the law of England was so vague that, if cases raising the question should ever occur the judges would be practically able to lay down any rule which they considered expedient."[21]

Lord Bacon, in his commentary upon the maxim, *"necessitas inducit privilegium quoad jura privata"*, said, "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 a stranger. First of conservation of life: if a man steals viands to satisfy his present hunger, this is no felony. 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 is justifiable."[22]

Bacon's dictum that stealing to satisfy hunger is not larceny is hardly supported by Staunforde, whom he cited for it; it is expressly contradicted by Lord Hale;[23] and Blackstone declared that it was an "unwarranted doctrine borrowed from the notions of some civilians, and that the law of England admitted of no such excuse. "And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself

[21]History of Criminal Law, p. 108. This was written in 1883, a year before the decision in Reg. v. Dudley L. R. Q. B. Div. 273. In a later work, written after this decision, Stephen declared that the defence "is hardly ever raised, and when raised, is always, as it ought to be, to be dealt with exceptionally. There is not, and I think there cannot be, any principle involved in cases of this kind." A General View of the Criminal Law, p. 76.

[22]Maxims, Reg. V.

[23]Historia Placitorum Coronal, p. 54.

who pleads them. Where charity is reduced to a system, and interwoven in our very constitution, our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous."[24]

Bacon's dictum as to the boat or plank, *"tabulum in naufragio"*, is said to be derived from the canonists.[25] He cited no authority for it.[26] Hawkins stated it cautiously and in a somewhat modified form: "If two be shipwrecked together, and one of them get upon a plank to save himself, and the other also, having no means to save his life, get upon the same plank, and finding it unable to save them both, thrust the other from it, whereby he is drowned, *it seems* that he who thus preserves his own life at the expense of that of another, may justify the fact by the inevitable necessity of the case."[27] Blackstone approved the dictum in this modified form, saying, "He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity, and the principle of self defence; since their both remaining on the plank is a mutual, though innocent, attempt upon and endangering of each other's life."[28] On the other hand, the court in *Reg. v. Dudley* appear to have been willing, if necessary, to overrule the dictum about the plank, though Stephen considered that their actual decision did not overrule it.[29] Stroud declared that it was an "exploded theory,"[30] but it

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[24]Commentaries. The question has caused much speculation. Grotius and Puffendorf and many other foreign jurists have agreed with Bacon's dictum. Cicero asserted the contrary, declaring that "suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum". The Jewish law, as certified by Solomon, declared: "If a thief steals to satisfy his soul when he is hungry, he shall restore sevenfold." This was the ordinary punishment for theft. In a case at Amiens, France, in 1898, the Court of Appeal acted upon Bacon's principle. The contrary view seems, however, to be more generally adopted by French judges. Henny, Criminal Law, p. 76.

[25]Bacon revived an ancient problem which Cicero had cited from the Rhodian moralist, Hecato.

[26]Reg. v. Dudley, L. R. Q. B. Div. 273, (1884).

[27]Pleas of the Crown, Book I, c. 10, sec. 16.

[28]Commentaries.

[29]Digest of Criminal Law, Art. 33.

[30] Mens Rea. p. 259.

has been expressly approved in an American case.[31]

Blackstone recognized the existence of the defence. "A sixth species of defect of will is that arising from compulsion and inevitable necessity. These are a restraint upon the will, whereby a man is urged to do that which his judgment disapproves, and which it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and expedient that a man should be excused for those acts which are done through inevitable force and compulsion."[32]

Though some of the English law writers have been willing to accept the defence, in the only English case in which it was expressly raised, it failed.[33] Three men and a boy escaped in an open boat from the shipwreck of the yacht Mignonette. On the twentieth day, when they were a thousand miles from land and had been eight days without food, the men killed the boy and fed on his flesh for four days, after which they were rescued by a passing ship. At the time of the killing there was no ship in sight and no reasonable prospect of relief; starvation was imminent; the boy, particularly, being in an extremely weak condition. On their arrival in England two of the men were tried for murder. Their counsel relied upon Lord Bacon's dictum about the plank, but the court held that they were guilty

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[31]U. S. v. Holmes, 1 Wall Jr. 1. In considering the plank case three different situations may be distinguished: (1) A gets to the plank and shoves B, who attempts to get on, off. A, it is said, would be justified. It is a case not of necessity but self defence. May's Criminal Law, 3rd ed. p. 69; (2) A gets to the plank first and B shoves him off. Bacon says B would be justified because of necessity. Reg. v. Dudley intimates the contrary and Stroud so declares; (3) A and B get to plank at the same time, and A shoves B off. Blackstone and Hawkins think that A would be justified. May thinks he would not be.

[32]Commentaries, vol. 4, p. 28.

[33]Reg. v. Dudley, L. R. Q. B. Div. 273 (1884). There is a dictum by Lord Mansfield, in Rex v. Stratton 21 How. St. Tr. 1046, to the effect that an act of treason, like the deposition of a colonial governor, might, in circumstances of public danger, be justified by its "necessity". The correctness of this dictum was apparently conceded by Lord Coleridge in Reg. v. Dudley, but it has been stated that the judgment in Rex v. Stratton "cannot be regarded as giving any considerable measure of support to the general excuse of necessity." Stroud, Mens Rea. p. 308.

of murder. In delivering the judgment, Lord Coleridge dealt exhaustively with all the supposed authorities for the alleged excuse of necessity and pointed out that they had failed to establish any such principle. He stated that Bacon's dictum about stealing food had been scouted by Hale, and that if necessity could not excuse theft, it certainly could not excuse murder. He appears to have been willing, if necessary, to overrule the dictum about the plank.

It has been stated that "the law regarding the supposed excuse of necessity is now fortunately settled by the famous case of *Reg. v. Dudley*,[34] but this is not clear. The court said that "there are many conceivable states of things" in which Bacon's dictum might be true, but declared emphatically that there was no general principle of law which entitled a man to take the life of an innocent person in order to save his own. "The *ratio decidendi* was the broad and salutary principle that, except in defence against acts of oppression, within the well defined limits of homicide *se et sua defendendo*, no persons are allowed to destroy human life, for the purpose of saving the lives of themselves, or of some of them."[35]

Stephen thought that *Reg. v. Dudley* should be treated as a case apart from all others, from which no principle can be gathered for the supposed excuse of necessity, which he vaguely suggests should be more or less capriciously applied to, or withheld from, such extraordinary cases, as and when they arise. He expressly distinguished the plank case. "The boy was deliberately put to death with a knife * * *. This is quite different * * * from the two men on a plank. Here the successful man does no bodily harm to the other. He leaves him a chance to get another plank."[36] This distinction has been declared to be "obviously absurd", and "to have been written in a spirit of grim humor."[37]

The extreme pressure of circumstances has been recognized as a defence in the United States in a variety of

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[34]Stroud, Mens Rea, p. 259.

[35]It is interesting to note that, prior to the wreck of the Mignonette, Stephen had said that in the case of shipwrecked people in a boat unable to carry them all, "it is impossible to suppose that the survivors would be subjected to legal punishment." History of Criminal Law, vol. 2, p. 108. In Reg. v. Dudley a sentence of death was later commuted to ten years imprisonment at hard labor.

[36]Digest of Criminal Law, Art. 33.

[37]Stroud, Mens Rea, p. 263.

cases.[38] Perhaps the leading, as well as the most interesting, case is that of the wreck of the William Brown, which furnished the basis of the litigation in *U. S. v. Holmes,*[39] and the theme for the book "Human Jettison." In this case, after a shipwreck, members of the crew threw overboard fourteen passengers in order to lighten the load of a life boat which was leaking. On the following morning the life boat was picked up by a passing vessel. Upon the trial of one of the crew for manslaughter, the principal defence was "necessity," by virtue of which it was contended that the killing was justified. The court recognized the existence of a law of necessity by virtue of which if two persons who owe no duty to each other that is not mutual, should by accident, not attributable to either, be placed in a position where both cannot survive, neither is bound to save the other's life by sacrificing his own, nor would either commit a crime in a struggle for the only means of safety", but held that this principle did not apply where the slayer was "under a legal obligation to make his own safety secondary to others, as in the case of crew and passengers." The court said, "While we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that if the passenger is on the plank, even the law of necessity justifies not the sailor who takes it from him." "When a ship is lost by tempest or other danger of the sea, and all aboard have taken themselves for safety to the small boats, * * * the sailor is bound to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there is no reason why the law does not still remain the same." The court said further that, if there were time, "there should be consultation and some mode of selection fixed by which those in equal relations should have an equal chance for life." The selection of the particular persons to be sacrificed in such a case, said the

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[38]U. S. v. Ashton, Fed. Cas. No. 14, 470 (refusal of crew to obey captain's order to continue voyage with an unseaworthy ship); The Brig William Gray, Fed. Cas. No. 17, 694 (violation of embargo due to stress of weather); Res. v. McCarty, 2 Dall. 86 (joining enemy to keep from famishing); C. v. Patterson, 16 W. N. C. 193 (selling liquor without a prescription in an emergency); S. v. Jackson, 71 N. H. 552, 53 A. 102 (withdrawal of child from school because of ill health.

[39]1 Wall, Jr., 1, Fed. Cas. No. 15, 383.

court, should be by lot. "When the selection is by lot the victim yields of course to his fate; or, if he resists, force may be employed to coerce submission."[40]

Stephen, speaking of this case, said, "Such a view appears to me to be over refined. Self sacrifice may or may not be a moral duty, but it seems hard to make it a legal duty, and it is impossible to state its limits or the principle upon which they can be determined. Suppose one of the party in the boat had a revolver and was able to use it, and refused to draw lots or to allow himself or his wife or daughter to be made to do so, or to be thrown overboard, could anyone deny that he was acting in self defence or in defence of his nearest relations, and would he violate any legal duty in so doing?"[41]

From the decision and dicta in the Holmes case, it appears that: (1) the so-called law of necessity will in some cases excuse a positive act resulting in death; (2) in cases of imminent and deadly peril, it justifies a killing by one owing no special duty to another; (3) it does not justify a killing by one owing a duty to subordinate his own safety to that of the person killed, in which class falls the killing of a passenger by a seaman; (4) as between passenger and passenger, and seaman and seaman, no special duty exists.[42]

The existence, in case of shipwreck, of a *moral* duty of a captain to his crew, of the crew to passengers, and of men to women and children has been judicially recognized.[43] The existence of a *legal* duty of crew to passengers has also been judicially asserted.[44] The moral duty of men to women was fulfilled by the crew in the Holmes case, but there is no authority that, in such cases, there is a legal duty. No legal foundation for the now familiar phrase "women and children first" has been found.

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[40]In Reg. v. Dudley, Lord Coleridge, speaking of U. S. v. Holmes, said, "The American case in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but, on the rather strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot (?) can hardly be an authority satisfactory to a court in this country." There would, indeed, be something grotesque in the notion of a right to vote in such a case.

[41]History of Criminal Law, vol. 2, p. 109.

[42]Law Notes, June, 1912. It has been suggested that sailors who take the life boats leaving the passengers behind to perish are criminally liable within the principle of the Holmes case.

[43]Reg. v. Dudley.

[44]U. S. v. Holmes.

The exact limits of the defence under discussion, even if it is to be recognized, are difficult to determine.[45] How extreme must the emergency be? An eminent authority has essayed the following definition: "An act which would otherwise be a crime may in some cases be excused if the accused can show: (1) that it was done in order to avoid consequences which could not otherwise be avoided; and (2) which, if they had followed, would have inflicted on him or others whom he was bound to protect inevitable and irreparable evil; (3) that no more was done than reasonably necessary for that purpose; and (4) that the evil inflicted by it was not disproportionate to the evil avoided. The extent of the principle is uncertain."[46] It has been declared that this statement is vague and uncertain, and that nothing can be said in favor of this definition except that the last sentence renders it comparatively harmless; but it has been quoted with approval and applied in an American case.[47]

Perhaps it is scarcely safe to lay down any more definite rule than one suggested by Stephen, viz., "It is possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand, and must be adjudicated by a jury afterward, the jury not being under the pressure which influenced the alleged offenders." "I see no good in trying to make the law more definite than this, and there would, I think, be danger in attempting to do so. There is no fear that people will be too ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances."[48]

The recognition of the defence of the extreme pressure of circumstances may be justified on either one of two theories: (1) that self preference is proper in the cases supposed; or (2) that, even if it is improper, the law cannot prevent it by punishment, because a threat of punishment at a future time is not sufficient to overcome the fear of present evil. Under either theory the defence is difficult to delimit.

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[45]"Who is to be the judge of this sort of necessity?" Reg. v. Dudley.

[46]Stephen, Digest of Criminal Law, Art. 32.

[47]C. & O. R. R. v. Com. 119 Ky. 519, 84 S. W. 566.

[48]Stephen, History of Criminal Law, vol. 2, p. 110.

The first theory is based on the assumption that in certain cases a person may sacrifice another for himself and *a fortiori* that a people may. Its application requires a comparison of values. When it is applied in a prosecution for homicide, it might well be asked, "By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?"[49] A distinction might well be taken between: (1) cases where the criminal act inflicts injury on a private person; and (2) cases where it does not. It might well be for the public interest in the first class of cases in order to prevent the increase of crime, to hold that a man should be held to a choice of evils, injury to himself or criminal punishment, and should not be allowed to shift his injury to another. On the other hand, where the criminal act directly injures no individual, the result of excusing the act is not to allow the shifting of the burden to another person, but to benefit one at the cost of allowing an act that ordinarily public policy forbids, and it would seem that extreme emergencies might afford a justification.[50]

The adoption of the second theory involves an abandonment of the retributive and an adoption of the deterrent theory of punishment. Punishment for deterrence should be inflicted only where it is possible to deter. Where deterrence is impossible such punishment should be renounced. A man may have motives adverse to the law of such great strength as to overcome any fear that can be inspired by the terror of any legal punishment. He may be urged to the commission of a crime by motives more proximate and imperious than any sanction the law can hold out. In such cases, as the threats of the law are necessarily ineffective, they should not be made, and their fulfillment is gratuitous cruelty—the infliction of needless and uncompensated evil.

W. H. HITCHLER

WILLS — CONSTRUCTION — NEXT OF KIN. IN RE: *Stoler's Estate, 293 Pa. 433,* decided by the Supreme Court, Pennsylvania, June 30, 1928.

Testator in his will gave to his wife a life estate in all of his property and then provided as follows:

[49]Reg. v. Dudley, supra.

[50]The stealing bread cases would come in the first class. The embargo, and liquor cases, in the second. May, Criminal Law, 3rd ed., sec. 68.