



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 36
Issue 4 *Dickinson Law Review - Volume 36,*
1931-1932

5-1-1932

The Law of Necessity

Frederick G. McKean Jr.

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Frederick G. McKean Jr., *The Law of Necessity*, 36 DICK. L. REV. 237 (1932).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol36/iss4/2>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

The Law of Necessity

Mr. Hugh Gotein, of Gray's Inn, made a very useful observation when he defined law as "the sum of the influences that determine decisions in courts of justice." Among these "influences that determine decisions" may be enumerated rules, principles and concepts. Every concept or leading idea is the product of an abstracting process more or less exhaustive; and legal concepts are often found in the fields of current notions of morality and of practical wisdom. Very frequently we see such concepts resorted to when a court decides a case "on first principles".

In the realm of jurisprudence there are at least two aspects of the law of necessity, one of law originating in necessity and the other the law of cases of necessity. Both principles shade almost imperceptibly into the doctrine of convenience—sometimes into the doctrine of social utility.¹ It has been remarked by Dr. Lieber that every idea has its caricature, and a not uncommon caricature of the idea of "necessity" is one involving the gratification of an eager desire to accomplish a cherished purpose. Such a distortion we find when Cromwell sought to extenuate illegal conduct by asserting that "necessity hath no law." This is, of course, an extreme illustration of a fallacy which has wrought much mischief on many occasions. Milton mistrusted the concept of necessity for he deemed it "the tyrant's plea." Mr. Justice Baldwin disagrees with both views, for in a homicide case,² he discusses a "law of necessity". Both the Cromwellian and the Miltonian views are useful as sign-posts pointing out the dangerous lengths to which the doctrine of necessity might be stretched, if not curbed by due observance of principles of justice and fair play to say nothing of the ancient rule, *summum ius*,

¹The concept of necessity has at all times been a causal source of common or court-developed law, and is frequently primordial.

²United States v. Holmes, 1 Wall. Jr. 1, 22, 23 (U. S. C. C. 1842). Furthermore, Coke has cited Bracton, fol. 247a, as authority for a maxim, "Necessitas facit licitum quod alias non licitur. Necessity makes that law which otherwise is unlawful." 10 Co. 61 (1792 ed.)

summa injuria. That the danger is real and not merely speculative is apparent when we find writers of considerable ability citing the case of *DeLima v. Bidwell*³ as an authority for Congress to assume power by necessity and not by authority of the Constitution—a proposition which sounds like a doctrine of *coup d'état*. Those of us who respect the warnings of President Coolidge and many others against suffering the States of the Union to sink to the level of French departments or municipal corporations are alive to the dangers of such a political theory. It is true that the language of the majority opinion in *DeLima v. Bidwell*, will support the position objected to, for we find it stated that “the assumed authority of Congress to govern and control the Territories is an authority which arises not necessarily from the territorial clauses of the Constitution, but from the necessities of the case, and from the inability of the States to act upon the subject.”⁴ But if we remember, as Chief Justice Marshall and many others have pointed out, that the Constitution is not to be treated as a mere code; and in addition, if we recall the specific constitutional powers of Congress, “To make all laws necessary and proper for carrying into execution***all powers vested ***;” and apply such authority to the Territorial clause we can support the result arrived at in *De Lima v. Bidwell*, without doing violence to the letter or spirit of the Constitution, and be in no danger of losing sight of the fundamental principle that the powers of Congress are delegated and not inherent.⁵ In addition to this, inasmuch as one of the many secondary meanings of the word “necessity” is desirability, a roughly approximate statement of the authority to enact “laws necessary and proper,” would be that it sanctions all legislation deemed advisable by its en-

³182 U. S. 1 (1900).

⁴At page 196.

⁵Almost immediately after drafting the foregoing, the present writer found the following passage in the case of *Missouri v. Holland*, 252 U. S. 416, 433 (1920); “It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with.”

actors, which is within the limits of constitutionality.⁶ Here it may be remarked that Mr. Dooley's oft-quoted pleasantry that the Supreme Court follows the election returns, was a keen observation of the fact that legislation in accord with the felt necessities of the times, will be sustained by that tribunal, so far as such enactments are found to be permitted by a Constitution which contemplates a government of delegated powers.⁷ In this connection it may be observed that the constitutionality of a statute may depend upon environmental facts; for it has been held that a law valid when enacted may be rendered invalid through later changed circumstances;⁸ and conversely, it has been decided that a law invalid at one time may become valid under a change of conditions.⁹ The law of necessity sometimes compels courts to ignore statutory requirements impossible to comply with, as in the case of an early act of Parliament which specified that legal proceedings be conducted in the English language, at a time prior to the days when the East Midland dialect became classic English, and in an era when there was no English language but only a variety of mutually incomprehensible English dialects. An analogous situation arose in one of the New England states when an act of Assembly required the members of the Supreme Court to write opinions in all cases, even when on circuit, a task which proved to be a physical impossibility on account of pressure of business. We need not go so far as some early commentators who laid down the doctrine that a statute is void if impossible to comply with, but merely observe that it is in abeyance so long as the impossibility continues.

It cannot be stressed too often that the concept of necessity is impossible of reduction to measured formula or statement. There are too many kinds of necessity.¹⁰ Furthermore legal history teaches us that to a considerable

⁶Cf. *Julliard v. Greenman*, 110 U. S. 421, 440 (1884).

⁷Cf. *Hodges v. United States*, 203 U. S. 1, 16 (1906); *Kansas v. Colorado*, 206 U. S. 46, 90 (1907).

⁸*Vigeant v. Postal Telegraph Co.*, 260 Mass. 335 (1927).

⁹*Newton v. Consolidated Gas Co.*, 258 U. S. 165 (1922).

degree necessity varies with time, place and occasion. One interesting kind of necessity is that, which sometimes arises, of taking jurisdiction. It manifests itself in many ways. One interesting way is to apply new concepts to old forms of law, (which make no express provision for dealing with the new material), by means of a legal fiction, for fictions are often found to be necessary adjustments to changes in environmental facts. A famous illustration of this was the invention of the fiction of implied promises in quasi-contracts, devised to give a remedy in an epoch when we find "conscience encroaching on the common law." Another way in which the principle has manifested itself is illustrated by the assumption of equitable jurisdiction by courts of common law—a procedure found to be absolutely essential to the ends of justice where local prejudice or inherited difficulties have prevented the creation of separate courts of equity.¹¹ Very frequently the mystic phrase, "the law implies," really covers an imputation of something which does not exist—and is to that extent a fiction—an equitable fiction, however, in the widest sense of the word equitable, implying that which is requisite and essential to the end of justice; in other words a resultant of the irresistible pressure of social and jurial necessity. In like manner occasions arise when the principle *communis error facit jus* is found to be binding on grounds of social and juristic necessity;¹² but this doctrine is one to be applied with great caution.¹³

¹⁰We find scattered throughout the reports such phrases as, absolute necessity, apparent necessity, extreme necessity, imperious necessity, juristic necessity, moral necessity, overruling necessity, practical necessity, and urgent necessity. But where do we find in any realm of social activity a concept free from a conflation or fusion of elements?

¹¹Cf. *Republica v. Coates*, 1 Yeates 2 (Pa. 1791); *Haldane v. Fisher*, 1 Yeates 121 (Pa. 1792); *Jordan v. Cooper*, 3 Sergt. & R. 564, 578, 585 (Pa. 1818).

¹²Cf. *Manchester v. Hough*, Fed. Cas. 9,005 (1828), Story, J.; *O'Donell v. Glenn*, 9 Mont. 452, 23 Pac. 1018 (1890); *Caldwell v. McLaren*, 9 App. Cas. 392, 409 (Eng. 1884).

¹³Cf. *McKean*, *Communis error facit jus*, 34 Dick. L. Rev. 34-48 (1929).

Strange as it now seems, it took many years of experience to convince leaders of thought that there is such a concept as homicide by necessity. Chancellor Kent says that the right of self-defense is part of the law of our nature,¹⁴ and *a priori* philosophers assume that this view has always prevailed; but the legal historian knows that in England it was not until 1828 that the innocence of excusable homicide was expressly recognized. Prior to that time, back to the days of "the English Justinian", it was the law if a man under arrest had committed homicide by misfortune or in his own defense and there was a verdict found, "the king shall take him [the prisoner] in his grace, if it please him."¹⁵ Strictly speaking homicide by necessity arises only in cases of self-defense.¹⁶ Justifiable homicide, such as killing to prevent a felony, is not homicide by necessity, although many writers and some courts have assigned it to such a category, possibly because of the incidental employment of the term "necessary" in instructions to juries as to the urgency and expediency of homicide by an officer; but, it is believed, that there is more the concept of "not unreasonable" than of essentiality when the term "necessity" is employed in this class of cases.¹⁷ While it has been said that nature and social duty cooperate in the repelling of force by force where a felony is attempted upon the person,¹⁸ the force that a man may lawfully use in the protection of person or property does not extend to the endangering of human life or the infliction of great bodily harm, except in extreme cases.¹⁹ Self-preservation alone does not justify homicide, despite the theoretical disquisitions of some philosophers, for the law does not approve of a man saving his life by

¹⁴1 Kent. Com. 48; 2 id. 15.

¹⁵Statute of Gloucester, 6 Ed. I, c. 9, (1277).

¹⁶Cf. *Logue v. Com.*, 38 Pa. 265, 268 (1861); *Queen v. Dudley*, 14 Q. B. D., 273, 283 (Eng. 1884).

¹⁷Cf. *State v. Smith*, 127 Iowa 534, 537 (1905); *State v. Morgan*, 3 Ired. 186, 193 (N. C. 1842).

¹⁸*Com. v. Riley*, Thach. Cr. Cas. 471 (Mass. 1837).

¹⁹*Braddy v. Hodges*, 99 N. C. 319 (1889).

killing an innocent and unoffending neighbor.²⁰ The trend of opinion in regard to homicide in self-defense (or homicide by necessity as it is often designated), is to the effect that the defendant must show: (1) That he was not the aggressor or provoker of strife;²¹ (2) That he could not have avoided the resort to extreme measures with any reasonable degree of personal safety;²² (3) That his act was prompted by an honest belief of imminent personal danger and of a necessity to kill;²³ and (4) That he had reasonable grounds for his belief as to the necessity of his act.²⁴ "The law of self-defence is a law of necessity, and that necessity must be real, or bear all the semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable or excusable." While there are dicta to the contrary,²⁵ the right of self-defense is restricted to those who are blameless, and even then, only where there is a reasonably apparent necessity for a resort to steps taken in furtherance of such a right. The question of the *onus probandi* in prosecutions for homicide where self-defense is averred, is one of great interest. Undoubtedly it is for the state to prove the defendant's guilt, and not for the defendant to prove his innocence. At the same time there is a presumption that intentional killing is unlawful;²⁷ and assuredly a plea of homicide by necessity admits that the killing was intentional. Although the defence of homicide by necessity is included under the gen-

²⁰Arp v. State, 47 Ala. 5, 19 L. R. A. 357 (1893); State v. Weston, 109 Ore. 19 (1923); Queen v. Dudley, 14 Q. B. D. 273, 286 (Eng. 1884). Cf. Fichte, *The Science of Rights* (Kroeger's transl. 1869) 170.

²¹State v. Ray, 166 N. C. 420, 432 (1914); 4 Vin. Abr. tit. Necessity (1793 ed.) 536.

²²U. S. v. Holmes, 1 Wall. Jr. 1, 22 (U. S. 1842).

²³Steinmeyer v. People, 95 Ill. 383 (1880); Com. v. Weathers, 7 Kulp, 1, 10 (Pa. 1892); U. S. v. Salandanan, 1 Philippines 478 (1902).

²⁴People v. Lombard, 17 Cal. 317 (1861); People v. Williams, 240 Ill. 633, 644 (1909); Com. v. McGowan, 189 Pa. 641 (1897); Reg. v. Rose, 15 Cr. C. C. 540 (Eng. 1884).

²⁵E. g.,—State v. Kellogg, 104 La. 580, 594 (1900).

²⁷People v. Lamb, 17 Cal. 323 (1861); State v. Evans, 124 Mo. 397, 411 (1894); State v. Brittan, 89 N. C. 481, 502 (1883); Rex v. Greenacre, 8 C. & P. 35, 42 (Eng. 1837).

eral issue, it is treated as a plea in the nature of confession and avoidance.²⁸ In civil cases this would cast upon the defendant the *onus* of proving the matter set up in avoidance; but it has been held, that in criminal cases it is not necessary for a defendant to establish matter in excuse or justification by a preponderance of evidence.²⁹ In other words, the *onus* of showing justification, excuse or mitigation, is upon the prisoner, not beyond reasonable doubt nor according to the preponderance of the testimony, but to the satisfaction of the jury.³⁰

The word "necessity" is frequently employed as a mere synonym for "condition precedent", and is thus used in referring to such questions as, the requirement of actual notice of the retirement of a member of a partnership in order to relieve such retiring partner from liability for subsequently incurred obligations of the firm from which he has withdrawn; and the essentiality of notice to an agent of revocation of a power of attorney to convey real estate. A very important branch of the law in which the word "necessity" is widely employed is the subject of eminent domain. Here the term necessity signifies something which is reasonably serviceable in the furtherance of a recognized public exigency. In view of the numerous admirable and well-indexed writings on the law of eminent domain, there would appear to be no need of enlarging upon this particular topic, further than to remark that nothing but an abuse of power by the body entrusted with the duty of making a finding "of necessity", in condemnation proceedings, would justify a court in disturbing such finding.³¹ Implied powers are often said to be such as are necessary to carry into effect those which are expressly granted, and are therefore presumed to be within the intention of the grantor.³² Here the idea of necessity is one

²⁸Ragsdale v. State, 12 Ala. App. 1, 12 (1915).

²⁹Tiffany v. Com., 121 Pa. 165, 181 (1888).

³⁰State v. Willis, 63 N. C. 28 (1868).

³¹Philadelphia v. Ward, 174 Pa. 45, 18 Atl. 522 (1896).

³²City of Madison v. Daley, 58 Fed. 751, 755 (U. S. C. C. Dist. Ind. 1893); People v. Chicago Trust Co., 130 Ill. 268, 283 (1889).

of reasonableness and not of indispensability, and comprises that which is obviously appropriate and convenient to carry out an express purpose;³³ but does not extend to that which is merely profitable or advantageous,³⁴ or but remotely connected with the purposes of the grant.³⁵ The phrase "incidental power", is practically synonymous with "implied power", for it has been defined as one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it.³⁶

The far reaching principle *de minimis non curat lex*, covers a vast number of rules of law. Its applicability is based upon the principle of juristic necessity.³⁷ A frequently misleading phrase in legal terminology is that of "easements by necessity", especially in the form "rights of way by necessity". Too many people have been led thereby to a belief that the doctrine confers a right to treat the property of a stranger as subservient to their needs. It is conceived that on the contrary, whenever the right to an easement or quasi-easement is recognized by courts of law or equity as deriving from "necessity", it will be found to have arisen *ex aequo et bono*. The better view in regard to pleading an easement "by necessity", is that general terms are not sufficient.³⁸

It can hardly have escaped the notice of those who have given any thought to the subject of this paper, that there is a variety of connotations of the term necessity, ranging from indispensability and inevitability to convenience and utility. Thus the certificate of necessity of the public service commission, is based upon the reasonable requirements of the public.

³³State v. Hancock, 35 N. J. L. 537, 545, 546 (1871).

³⁴Citizens Electric Illum. Co. v. Lackawanna & W. V. R. R. Co., 255 Pa. 176, 184, 185 (1916).

³⁵People v. Pullman Car Co., 175 Ill. 125, 137 (1898).

³⁶People v. Chicago Trust Co., 130 Ill. 268, 283 (1889).

³⁷McKean, *De Minimis Non Curat Lex*, 75 U. Pa. L. Rev. 429 (1927).

³⁸Roper Lumber Co. v. Richmond Cedar Works, 158 N. C. 161, 167 (1912).

Where all the relevant facts have been considered and weighed by a commission the general practice is for courts of law to sustain its findings, unless clearly erroneous.³⁹ A certificate of necessity constitutes a finding of great or urgent public convenience, and so great a public benefit that the want of it would be a great public inconvenience.⁴⁰ Of course a proper finding as to public convenience must be substantially supported by sufficient evidence,⁴¹ and, where such is the case, the courts lean toward resolving all doubts in favor of the findings of a public service commission.

Over a century ago, Chief Justice Parker, of Massachusetts, recognized a principle of moral necessity, comparatively easy of apprehension but difficult to define. In discussing the then recently recognized necessity of discharging a jury for failure to come to an agreement, or for other compelling cause, he said the compulsion was not physical but "a moral necessity arising from the impossibility of proceeding with the cause without producing evils which ought not to be sustained."⁴² Similarly it has been recognized that the admission of dying declarations in homicide cases is necessary at all times, for it is "a public necessity which civilized society feels the pressure of, for the protection of human life by the punishment of man-slayers."⁴³ There is frequently an element of compulsion in cases of moral necessity, which sometimes amounts to irresistible force. Thus, a compliance by individuals or corporations with the demands of civic or military necessity might arise from a feeling of the moral obligation to discharge the duties of good citizenship, or be prompted by a prudent desire to avoid the uncomfortable consequences likely to ensue from failure to observe such duties in time of stress.

³⁹Com. v. Gilligan, 195 Pa. 405, 409, 46 Atl. 124 (1900).

⁴⁰Com. v. Cambridge, 7 Mass. 158, 167 (1810); Hunter v. Newport, 5 R. I. 325, 330 (1858).

⁴¹Utilities Commission v. Toledo etc. R. R. Co., 286 Ill. 582, 589 (1919).

⁴²Com. v. Purchase, 2 Pick. 521, 525 (Mass. 1824).

⁴³Com. v. Roddy, 184 Pa. 274, 289, 39 Atl. 211 (1898).

Very frequently the word "necessity" appears in indexes as a heading for the topic Sunday laws. Much of the history of Sunday observance and Sunday law could be recovered from the scholarly opinion of Chief Justice Clark, of North Carolina, in the case of *Rodney v. Robinson*,⁴⁴ if the original authorities were lost. Virginia seems to have been the first common law jurisdiction which enacted such legislation, for she had a Sunday observance law three years before the landing of the Pilgrims at Plymouth Rock. In the strict sense of the term "common law" there is no Sunday observance requirement in that system of jurisprudence (with the exception that Sunday is *dies non iudicis* by a canon of the Church incorporated into the common law); but it is possible that there may be a few jurisdictions which will be found to hold that the statute 29 Car. II, c. 7 (1688) (prototype of most American Sunday laws), constitutes part of the local common law.⁴⁵ In general, Sunday laws in the United States, Canada and other common law jurisdictions, are interpreted in the spirit of the New Testament view that the Sabbath was made for man. The basis is largely humanitarian, and aimed against the economic coercion of employees and others to work on a day of rest.⁴⁶ Economic advantage or reduction of expense is not considered a necessity within

⁴⁴134 N. C. 503, 47 S. E. 19 (1904).

⁴⁵See *Valentine v. Roberts*, 1 Alaska 536 (1902). Cf. McKean, *British Statutes in American Jurisdictions*, 78 U. Pa. Law Rev. 195 (1929).

⁴⁶The humanitarian basis of Sunday laws seems to be lost sight of by extreme "Sabbatarians" and "Liberals" alike. A year or so ago some religious bodies in Western Pennsylvania made public protest against Sunday bathing and attempted to secure municipal legislation against it. On the other hand, some "Liberals" have been agitating for commercialized Sunday sports and amusements, overlooking the attendant economic pressure on employees to work on a day of rest, and, apparently unmindful of the consequent interference with the religious liberty of such employees to attend Divine service, if they so desire. Both views are opposed to the teachings of competent authorities who believe that one day's rest in seven is essential to the general welfare, and that irksome dictation is inconsistent with the right to be let alone during a period of rest.

the meaning of the exception "work of necessity", in Sunday laws; but avoidance of waste is authorized, such as bringing in crops to avoid impairment or destruction by the weather, transporting livestock to a place where they can be watered, or protecting oneself against an absconding debtor. It is almost a universal rule in common law jurisdictions that any act may be lawfully done on Sunday which it is lawful to do on any other day, unless there be some statute forbidding such conduct on Sunday. Acts of mercy are generally specifically excepted from the operation of Sunday statutes, but, where such is not the case, they are construed to be acts of necessity.

The basic principle of statutes of limitations is frequently expressed in the phrase "statutes of repose". In addition it may be observed that, under modern conditions, it is a virtual impossibility for business men to keep vouchers and other proofs of their transactions for an indefinite period. Hence failure to bring suit prior to the expiration of the time allowed by law will lead to forfeiture of a right to proceed, if insisted upon by the defendant. This is reasonable where a creditor or a tort victim has had a choice as to the time of bringing an action; but where he has had no option in the matter, and no opportunity has presented itself for bringing suit, it would be unjust to bar his right of action. In recognition of this principle, statutes of limitations contain exceptions for the protection of infants and certain other classes of helpless creditors or claimants under disability. In addition, the law recognizes an exception of cases arising from invincible necessity, and gives such exception the same force and effect that it does to those disabilities which are expressly favored in the statute.⁴⁷ There are many legal principles which concur in supporting this application of the law of necessity. Among these may be mentioned the maxim *cessante ratione legis cessat ipsa lex*, employed as a canon of statutory construction; and the familiar rule of public policy that the law does not require impossibilities (which latter rule is, in its

⁴⁷Hanger v. Abbott, 6 Wall. 532, 541 (U. S. 1867); Hill v. Phillips, 14 R. I. 93 (1883).

turn, a "law of necessity").

Unequivocal recognition of the inviolability of person and property is an outstanding characteristic of our system of law. That a man's house is his castle is a legal principle which has passed into common speech, and furthermore, a trespass upon one's premises by three or more persons, is an indictable offence at common law.⁴⁸ It follows that the law will tolerate encroachments upon the rights of others by private acts in a very limited class of cases, and only then upon principles of public policy. In such exceptional cases the justification of an act, otherwise tortious, is placed upon the ground of necessity and must be pleaded as such. The rule in *Mouse's Case*,⁴⁹ that a man may sacrifice the property of another to save his own life, or that of another, is the starting point of most of the earlier decisions in the law of cases of necessity, and is regarded as axiomatic. Without mentioning this rule, a few writers have cited the case of *Laidlaw v. Sage*,⁵⁰ as an extension of the doctrine of cases of necessity, by justifying the action of a man who, in peril of death from an assailant, interposes the body of an innocent bystander, as a shield. It is earnestly submitted that such an interpretation of the case of *Laidlaw v. Sage* is incorrect; for the opinion was that the act in question was involuntary on the presumption that an act or omission done or neglected under the influence of pressing danger, is done or neglected involuntarily. The doctrine of *Mouse's Case* as to justification of saving human life by acts which otherwise would be trespasses, is well established in this country. Thus where a sloop has been moored to another's dock to avoid the perils of threatening storms, it is tortious for the dock-owner to unmoor the vessel.⁵¹ So also it has been held that

⁴⁸*Saunders v. Gilbert*, 156 N. C. 463, 473 (1909), Walker J. It might be well, if writers on criminal law would lay emphasis upon the rule of law stated in *Saunders v. Gilbert*, which is too frequently ignored by high-handed contractors and golden-rule breaking automobile "tourists".

⁴⁹12 Co. 63 (Eng. 1609).

⁵⁰158 N. Y. 73, 52 N. E. 679 (1899).

⁵¹*Ploof v. Putnam*, 81 Vt. 471, 71 Atl. 188 (1908).

to forbid private citizens to arrest without a warrant would endanger the safety of society.⁵² All of which shows that

“the law of necessity***applies as well to personal as to real estate; to goods as to houses; to life as to property; in solitude as in a crowded city; in a state of nature as in civil society:***And the common law adopts the principle of the natural law, and places the justification of an act otherwise tortious, precisely upon the***ground of necessity.”⁵³

An extreme application of the doctrine was made in the case of *Commonwealth v. Passmore*,⁵⁴ where Chief Justice Tilghman held that “necessity justifies actions which would otherwise be nuisance*** this necessity need not be absolute, it is enough if it be reasonable.” From the days when the Israelitish land-owner was subject to military duty, down through the times when the *trinoda necessitas* was imposed upon the Anglo-Saxon land-holder, to the present era when the owner of improved real estate in the United States may be deprived of the uses of his premises for a year and a day although guiltless of participation in the offence for which he is penalized; there has never been a time when the ownership of real estate was free from burdens or exactions, more or less reasonable. Hence it is not at all surprising to find embodied in the common law the rule that an “entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire or any like danger, is not a trespass;***”⁵⁵ This rule may be supported in part by the familiar principle *de minimis non curat lex*, in addition to the law of necessity by which such entry finds its justification. Where, however, substantial damage is caused by an encroachment upon a man’s property for the purpose of preventing injury or destruction of the goods of the salvor, it is submitted that, *ex aequo et*

⁵²Wakely v. Hart, 6 Binn. 316 (Pa. 1814).

⁵³American Print Works v. Lawrence, 1 Zab. 248, 257, 258 (N. J. 1847).

⁵⁴1 Serg. & R., 217 (Pa. 1814).

⁵⁵Proctor v. Adams, 113 Mass. 376 (1873), Gray, C. J.

bono, damage caused thereby should be paid for.⁵⁶ Cases to the contrary, of which *Cope v. Sharp*⁵⁷ is a type, are harsh, to say the least, when they permit a man to impose a burden of expense upon the shoulders of a third party; and are clearly opposed to the principle laid down by Mr. Justice Holmes in the case of *Hudson County Water Co. v. McCarter*,⁵⁸ that "All rights tend to declare themselves absolute to their logical extremes. Yet all in fact are limited by the neighborhood principles of policy which are other than those on which the particular right is founded and which become strong enough to hold their own when a certain point is reached." There ought to be no vested right in anyone to benefit himself by inflicting a loss on another which he should in all fairness be required to pay; and this policy seems to permeate the French law which provides that the user of a right of way of necessity must pay an indemnity equivalent to the damage he may occasion.⁵⁹

"***the law itself, and the administration of it, must yield to that to which everything must bend—to necessity.⁶⁰ The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling ***impossibilities;⁶¹ and the administration of law must adopt that general exception in the consideration of all particular cases. In the performance of that duty it has three points to which its attention must be directed: In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect; for there may be a necessity which it would not. A necessity created by a man's own act,

⁵⁶*Vincent v. Lake Erie Transportation Co.*, 109 Minn. 564, 124 N. W. 221. (1910). Cf.: *Sheldon v. Sherman*, 42 N. Y. 484, 487, 488 (1872); *Chambers v. Bedell*, 2 W. & S. 225 (Pa. 1841), dictum; *Anthony v. Haney*, 8 Bing. 186, 193 (Eng. 1832), dictum; *Holmes, The Common Law*, 148-149 (1881).

⁵⁷(1910) 1 K. B. 168.

⁵⁸209 U. S. 349, 355 (1908).

⁵⁹Cachard, *French Civil Code*, Arts. 682-685 (1930 ed.).

⁶⁰*Respublica v. Sparhawk*, 1 Dall. 357, 362 (Pa. 1788); *Harrison v. Wisdom*, 7 Heisk. 99, 116 (Tenn. 1872).

⁶¹Compare the canon law maxim, *Nemo obligatur ad impossibile*.

with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature.⁶² Secondly, that the party who was so placed used all practical endeavours to surmount the difficulties which already formed the necessity, and which on fair trial he found insurmountable. I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business.⁶³ Thirdly, that all this shall appear by distinct and unsuspected testimony;⁶⁴ for the positive injunctions of the law, if proved to be violated, can give away to nothing but the clearest proof of the necessity that compelled the violation."⁶⁵

FREDERICK G. McKEAN, JR.

Pittsburgh, Pennsylvania.

⁶²State v. Ray, 166 N. C. 420, 430-1 (1914); 1 East, P. C. 273 (1806 ed.); Vin. Abridg., Vol. IV. tit. Necessity 539 (1793 ed.).

⁶³People v. Davis, 300 Ill. 226, 235 (1921); Com. v. McGowan, 189 Pa. 641 (1899); Reg. v. Rose, 15 Cr. C. C. 540 (Eng. 1884).

⁶⁴State v. Smith, 127 Iowa, 534, 537 (1905) *semble*; Troewert v. Decker, 51 Wis. 46 (1881).

⁶⁵The Generous, 2 Dod. 323, 324 (Eng. 1818) Sir W. Scott Lord Stowell.