

## LAW AND LAWYERS IN LITERATURE.<sup>1</sup>

### V.<sup>2</sup>

Horace very nearly raised a nice question of law in Book I., Epistle 20, when he pictured the owner of a refractory ass as giving him a final push to his destruction, when the ass apparently insisted upon backing over a precipice. For who would save an ass against his will? If the four-legged ass had been a two-legged one, it would have raised the nice question whether a crime had been committed in giving the final push to a man bent on destroying himself, after sincere though ineffectual effort to save him from his folly. It presents a nice point both for casuistry and law.

Eliminate both the final push and the efforts to save a person in danger of death, and we have a position which has actually presented itself in law, and which has to some extent been exploited by George Eliot. There is no difficulty about the responsibility for direct or indirect acts, whether intention is inferred from the consequences of the act, or is proved from extraneous sources. But where there is a mere omission to do some act which would clearly save a life, the situation becomes more or less complicated, according as the facts vary in each particular case.

It is conceivable that a man who can swim might stand on the bank of a river and watch a child drown. Such an abandoned wretch would properly receive the condemnation of society. But would he be guilty of a crime? What legal duty would he neglect? That question touches the acute point of the problem. If a man under a legal duty to perform a certain act should commit a breach of that legal duty by neglecting to do the act, he may, by the omission, become guilty of a crime. Sir James Fitzjames Stephen, in his "General View of the Criminal Law of England," says that a mother who, having the means to do so, wilfully omits to feed her infant child, and so starves it to death, is both legally and morally in the same position as if she put it to death by the means which caused its death. But the omission to do what is not a legal duty to do is no crime at all, even if the omission causes, and is intended to cause death. It is not a criminal offence to

<sup>1</sup> Copyright (Canada) 1926, by A. D. Armour, Toronto.

<sup>2</sup> Continuation of series of lectures begun in Vol. IV. of the CANADIAN BAR REVIEW.

refuse to throw a rope to a drowning man, or to allow a man to walk over a cliff or into a quicksand when a word of advice could save him.

George Eliot has presented this state of affairs in two places, viz., in "Middlemarch," and in "Daniel Deronda," though we shall find that the cases as presented are not exactly similar. It is said by Sir James Stephen that Lord Macaulay had some curious remarks on this subject in his notes on the Indian Penal Code, and that he (Sir James) lent the book to George Eliot for her novel "Middlemarch," in which the subject is approached, but that a more striking illustration of it is given in "Daniel Deronda."

In "Middlemarch," Mr. Bulstrode, an outwardly religious banker, was being blackmailed by Raffles, an old acquaintance, an abandoned man and a drunkard, who knew of something lurid in Mr. Bulstrode's past: Raffles fell into delirium tremens, and was lodged in a house under the care of an elderly woman who acted as nurse. Bulstrode made frequent visits to the house under the guise of charity, and watched the invalid from time to time, secretly, but earnestly, however, desiring his death. On the last night of Raffles' life, Dr. Lydgate prescribed for the patient moderate doses of opium in case of sleeplessness continuing for several hours, and gave minute instructions as to when the opium doses should cease, insisting on the risk of not ceasing and repeated his previous order that no alcohol should be given his patient. Bulstrode left the patient's room during the night, but did not communicate the doctor's last instructions to the woman who then took charge. During the night the nurse went to Bulstrode and told him that Raffles wanted something to drink, and that she could supply him with something if Bulstrode did not give it to her. He thereupon gave her the key of the wine-cooler and told her that she would find brandy there; and she accordingly took a bottle to the patient's room. When Bulstrode went to the room in the morning he saw the bottle with some brandy left in it, the opium phial nearly empty, and the patient asleep. The doctor arrived shortly afterwards, saw the state of affairs and pronounced his patient as past the hope of recovery. He died that day.

The other case is that of Mrs. Grandcourt. Mr. and Mrs. Grandcourt were an ill-assorted couple—an illustration of the cruel sport of Venus. While each maintained a polite exterior pose towards the other, his very presence was irritating to Mrs. Grandcourt almost beyond her powers of endurance; and he intensified her torture by insisting upon being in constant attendance on her.

When in Naples on a yachting cruise, the yacht being laid up for repairs, Mr. Grandcourt hired a small boat, and they both went for a sail. A squall struck the boat, and the boom carried Mr. Grandcourt overboard, where he was in peril of drowning, as he could not swim. Mrs. Grandcourt seized a rope, hesitated to throw it as the thought suddenly presented itself to her that release from her misery was at hand, and then repented, and threw herself into the water in a wholly ineffectual attempt to save him. Grandcourt was drowned, and Mrs. Grandcourt was rescued by some fishermen.

While the two cases appear at first sight to be almost parallel, it will be found on analysis that there is an important difference between them; and while Mrs. Grandcourt's case exactly reproduces Sir James Stephens' proposition, that of Mr. Bulstrode will be found not to be one of mere neglect.

In the first place, neither Mrs. Grandcourt nor Mr. Bulstrode was under any legal obligation, the one to care for the patient, the other to save her husband. A wife is not bound to provide her husband with maintenance, or medical assistance, or even to house him, though she may be in affluent circumstances. It is his duty to do all these things for her. She may let him starve if she will, while she lives in luxury, and yet not be liable to him or guilty of a crime. Bulstrode was a complete stranger to Raffles, as far as the law was concerned, and owed no legal duty to him to nurse him or provide him with necessaries! So far the cases are parallel. But there the analogy ceases and divergence begins.

Bulstrode undertook the burden of watching Raffles; in other words, he assumed a duty which he was not bound to assume. But as he assumed it, he was bound to perform it without negligence.<sup>1</sup> Secondly, he might possibly without blame have left the patient, and trusted to the woman's giving him too much opium, and to her supplying him with alcohol out of her private store, as she suggested she could do if Bulstrode would not supply the brandy. But the next step differentiates the case from that of Mrs. Grandcourt, because Bulstrode supplied the brandy, and thus put into the nurse's hands what, under the circumstances was poison, knowing that it would, and intending that it should be given to the patient; and omitted to tell her not to give too much opium. Now the act of furnishing the brandy was not necessarily a criminal act, because, as far as the facts stated are concerned, it was not certain that brandy alone would have caused the death of Raffles. That would

<sup>1</sup> *Turner v. Merrylees*, 8 T.L.R. 695; *Costaza v. Dom. Cannery Ltd.*, 21 O.W.N. 78, 51 O.L.R. 166.

have depended upon what the doctor might say, and his opinion is not disclosed to us in the story. And the omission to warn the nurse as to the opium might have been attributed to forgetfulness. I am treating the matter as it stands if only the patent facts were presented to a jury, and not with the inside knowledge, incapable of actual proof, which the novelist imparts to the reader.

On the other hand, there would have been evidence to go to a jury, that Bulstrode must have intended to commit a crime, because, first, he was being blackmailed by Raffles, and would have been glad to get rid of him. This might have been difficult to prove, but it could easily have been shewn that Raffles was molesting Bulstrode and occasioning him some inconvenience; and the resolution of Bulstrode to watch and nurse Raffles would be inexplicable unless there was some unseen bond between them. The former's known position was such that he could not have been on friendly terms with a man of Raffle's character. But, secondly, it could have been proved that Bulstrode undertook to watch Raffles, that the doctor gave minute instructions to Bulstrode as to the treatment, and that Bulstrode deliberately disobeyed the instructions as to withholding alcohol, and actively furnished what was poison to the patient; and it would have been easy to infer from his omission to instruct the nurse as to the opium that it was part of a design to ensure the death of the patient.

It is much to be regretted, from the lawyer's point of view, that the author did not think fit to bring Bulstrode to trial, as there was abundant material for a thrilling scene, and a wide field for the display of much logic and forensic skill both for and against the prosecution. Instead of this, we have to be contented with the tame little trial of Felix Holt for manslaughter.

The situation described by Sir James Stephen has actually arisen in Canada in two cases. In one case, a father who was a Christian Scientist performed the appropriate rites over his son, who nevertheless died for want of medical attendance, and he was convicted of manslaughter, because he was legally bound to supply his son with necessities, which included medical care and nursing. In the other case, a Christian Science healer took charge of a boy suffering from typhoid fever, and prayed for his recovery until he died. He was acquitted because, being a stranger to the boy, he was under no legal obligation to provide medical treatment.

The following further examples of cases where no legal duty existed to save life may be of interest.

In "The Tragedy of Two Ambitions," Thomas Hardy exploits this situation.

Joshua and Cornelius Halborough were the sons of a millwright. They were ambitious of rising in the world. Their father had dissipated £900 which their mother had left for the purpose of their education. Notwithstanding this loss they pursued their studies, and Joshua choosing Holy Orders as the best sphere in which to attain his ambition, was finally ordained. Cornelius became a school-master. Joshua, at his own expense, educated his sister. Their father, being a dissipated man and fond of obtruding himself upon his sons, who did not appreciate his attentions, was sent by them to Canada to be kept out of the way. The sister then returned to England from Brussels, where she was being educated, and came to reside with Joshua. While there she received the attentions of a wealthy landowner in the parish, and her marriage was confidently expected by Joshua. At this juncture the father returned to England, and his first adventures landed him in gaol. On being discharged he set out on foot to visit Joshua and to call on the landowner who he heard was about to marry his daughter; and sent word to his two sons to meet him at a neighbouring tavern. How to stop him was the problem that presented itself to his sons. They set out to meet him, but he passed them in the darkness; and turning back after failing to find him at the tavern, they over-took him. He was very disreputable in appearance, having tramped a long distance, and was under the influence of gin. He insisted upon going to call on his future son-in-law, while his sons held back and contemplated the blow that was about to fall. They heard him stumbling forward and suddenly as he missed his way, they heard him fall into a stream. Cornelius was for rushing forward to save him, but Joshua, the parson, held him back. Too late they went forward and found their father had disappeared, his body having floated into a culvert, where the remains were found some months later, but were unidentified.

In "The Right of Way," chapter 49, Sir Gilbert Parker describes Mrs. Steele as walking in her sleep towards a precipice over which she is sure to fall if she is allowed to proceed. Her husband sees the danger and is at first prompted to let her go on to her destruction, as he is in love with another young lady, but the nobility of his nature asserts itself, and he rushes forward and shuts and locks a gate towards which she is walking and so saves her.

In "Redgauntlet," at p. 233, Lady Greenmantle says to Daisie

Latimer: "The help which I now render you is all that may be in my power; it is such as I would render to a blind man whom I might observe approaching the verge of a precipice; it ought to excite no surprise, and require no gratitude."

In "Spragge's Canyon," by E. H. A. Vachell, Samantha is tempted to let Hazel Goodrich die of the effects of a snake bite, but banishes the thought, and after giving first aid by bandaging and sucking the wound, makes her way through an almost impassable country to get a doctor.

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CREMATION IN ENGLAND.—The first cremations in England were three at Woking in 1885. The Home Secretary (Mr. Cross) had, in 1879, forbidden the practice of cremation there, under the threat of passing an Act to make it illegal. But in 1884 appeared the well-known judgment of Mr. Justice Stephen which determined cremation to be a legal act, provided no nuisance were caused thereby to others. The case had arisen through a child's body having been burned by its father contrary to a coroner's order. Since 1885 the cremations at Woking have numbered 6,029; Manchester, 4,733; Glasgow, 1,525; Liverpool, 1,574; Hull, 772; Darlington, 365; Leicester, 596; Golders Green, 15,581; Birmingham, 1,353; Leeds, 560; City of London (Ilford), 997; Sheffield, 536; Bradford, 378; West Norwood, 2,406; Hendon Park, 34; and Pontypridd, 31—a total of 37,380. Of these, 2,877 took place last year, that being the highest number yet recorded in one year in this country.