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Homicide--Responsibility for Failure to Perform Affirmative Acts

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not absurd if the donor divests one heir in favor of others existing at the time of the testator's death.[10] The doctrine established in *National Bank of Fairmont v. Kenney*, according to the foregoing rules of construction, is thoroughly sound and justifiable.[11]

—EDWARD S. BOCK, JR.

HOMICIDE — RESPONSIBILITY FOR FAILURE TO PERFORM AFFIRMATIVE ACTS. — "Assuming that a woman takes the children into the water without the assistance of pulling them into the water by the man, but he stands by conniving to the act, (i. e. the wife's affirmative act of drowning her children and herself) what is the position from the standpoint of the law?" This interesting question was propounded to the court by the jury in the recent case of *Rex v. Russell*,[1] in which D, by his failure to act, was charged with the murder of his wife and children. The jury returned a verdict of manslaughter (1) as to the wife, and (2) as to the children. The court delivered seriatum opinions, concurring in the belief that D should be held criminally responsible for the death of the children. As to his responsibility for the death of the wife, however, there was total disagreement. One judge was of the opinion that the jury verdict should remain undisturbed; the second refused to uphold the conviction, and the third held the husband for manslaughter by aiding and abetting.

Merely from the standpoint of result, rather than the conflicting methodology of means, the case is important in reflecting a possible recognition in the law, of a change in moral values.

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real estate in fee if he survive the testator, and then, if the son die leaving no issue surviving him, to divest him of it in order to give it back to him in fee under the designation of heir or heirs of the testator." Welch v. Brimmer, *supra* n. 8.

[10] State Street Trust Co. v. Sampson, *supra* n. 3.

[11] The suggestion may be offered that the testator intended to protect the children of the devisee taking a life estate, by giving the estate to the testator's only heir, remainder to the issue of the beneficiary, then on the failure of issue of the donee, to the stock of the donee generally. But, in West Virginia, such a result would to-day be accomplished by the simple limitation, "A for life, remainder to the heirs of A", by reason of the abolishment of the Rule in Shelley's Case. Since this limitation is sufficient to arrive at the same result as that suggested by the advocates of the rule determining the testator's heirs at the time of his death, the deliberate language used by the testatrix would be superfluous, unless an intent other than that imposed by the primary construction was attributed to the testator.

[1] (1933) Vict. L. R. 59.

Heretofore, "criminal intent" was descriptive of affirmative "wrongful" action. Now, *Rex v. Russell* suggests that nonfeasance may result in criminal culpability, depending upon the intensity of the relationship between the parties.[2] The bond of family relationship tempts one into stretching nonfeasance into an active misfeasance.[3] But to employ such dialectic for the furtherance of our ends, is to conceal the real issue,[4] namely, our *desire* to sanction openly criminal responsibility in those cases where failure to act runs counter to the grain of our current *mores*.

Support for this desire cannot come from the criminal law itself, because of the paucity of precedents.[5] Either by direct legislation,[6] or by analogy to other fields of law can such liability be at least "rationally" justified. Mann, J., in the immediate case, borrowed language from the sphere of torts in holding D

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[2] POUND, INTERPRETATIONS OF LEGAL HISTORY 56: "If we must find a fundamental idea in the common law, it is relation, not will. If the Romanist sees all the problems in terms of the will of an actor and of the logical implications of what he has willed and done, the common-law lawyer sees all problems . . . . all those, indeed, in which he was not led to adopt the Romanist's point of view in the last century . . . . in terms of a relation and of the incidents in the way of reciprocal rights and duties involved in, or reuired to give effect to that relation.

[3] BOHLEN, STUDIES IN THE LAW OF TORTS 318: "On the whole, it may be said that duties to take positive action for the benefit and protection of others attach only to certain relations, and are imposed only when absolutely necessary to afford protection. Even in the case of family relationship, there is present the will of the citizen to become a husband and a father, so that even here relation is, in the last analysis the creature of voluntary action on his part.

[4] W. W. Cook, *"Substance" and "Procedure"* (1933) 42 YALE L. J. 333. "Nearly every discussion seems to proceed on the tacit assumption that the supposed 'line' between the two categories has some sort of objective existence, so to speak, and that the object is to find out, as one writer puts it, 'on which side of the line a set of facts falls'. This way of stating the problem, if taken literally, seems to the present writer to start off on the wrong scent, and to divert our attention from the fact that we are thinking about the case precisely, because there is no 'line' already in 'existence' which can be discovered by analysis alone . . . . there is no such 'line', but rather a 'no-man's land', the points of which can be assigned by the one making the classification either to the 'face' or to the 'background' without doing violence to 'logic' or 'reason'."

[5] *Paine's Trial* has often been cited as upholding conviction for manslaughter when the nonfeasance was "gross, culpable, and wicked." See WHARTON, CRIMINAL LAW, vol. III, p. 2082, footnote 1. A recent case, *State v. Harrison*, 152 Atl. 867 (N. J. 1931) held a servant of a railroad guilty of manslaughter when he failed to lower the gate or give other suitable notice of the approach of a train. This holding was despite the fact that the master was not under a contractual duty to protect the public as a whole. It is submitted that these cases are exceptions to the general rule.

[6] The following are extracts from various codes denoting legislative standards prescribing affirmative duties to act:

DUTCH PENAL CODE, art. 450: "One who witnessing the danger of death with which another is suddenly threatened, neglects to give or furnish him

under a *duty* because of the family relationship.[7] The civil theory of proximate causation was also applied in showing that the act of W was neither an excuse nor an intervening cause. McArthur, J., also employed tort language when he said: ". . . . the true position is that it is sufficient if the negligence complained of is *a direct* cause of the injury; it is not necessary that it should be *the* cause, that is, the sole direct cause. I have no hesitation in saying in the present case that the neglect of the prisoner to make any effort to save his children is not too remote a cause, but may, as a matter of law, be relied upon as a *direct* cause of the children's death".[8]

Other analogies point to a broadening of our concept of affirmative duties to another. The doctrines of equitable[9] and promissory estoppel[10] are both based upon an affirmative duty to prevent reliance on misleading conduct, whereby a third party would be induced to change his legal relationship. Running

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such assistance as he can give or procure without reasonable fear of danger to himself or to others, is to be punished, if the death of the person in distress follows, by a detention of three months at most and an amende of three hundred florins at most."

GERMAN CIVIL CODE, § 826: "One who wilfully brings about damage to another in a manner running counter to good morals is bound to make reparation to the other for damage."

INDIAN PENAL CODE, c. xviii, § 294, p. 76 (1837): "Whoever does any act or omits what he is legally bound to do with the intention of thereby causing, or with the knowledge that he is likely to cause the death of any person, and does by such act or omission cause the death of any person, is said to commit the offense of 'voluntary culpable homicide'."

LIVINGSTON, *Complete Works on Criminal Jurisprudence* II, 126-127 *Draft Code of Crimes and Punishments for the State of Louisana*: "Homicide by omission only, is committed by voluntarily permitting another to do an act that must in the natural course of things cause his death, without apprising him of the danger, if the act be involuntary, or endeavoring to prevent it if it be voluntary. He shall be presumed to have permitted it voluntarily who omits the necessary means of preventing the death, when he knows the danger, and can cause it to be avoided without the danger of personal injury or pecuniary loss."

[7] *Cf.* Yazoo & M. V. R. R. Co. v. Byrd, 89 Miss. 308, 42 So. 286 (1906), in which the *relationship* of railroads to their passengers was similarly stressed: "Railroads owe to their passengers the consideration and care of common humanity, it matters not how negligent a passenger may have been in producing the injury for which he sues. Such negligence does not absolve the railroad from the duty which it owes to him of proper attention after an accident shall have occurred, and if, when injured, the railroad company neglects this care, which common humanity would dictate, and by reason of this neglect, after injury has occurred, a passenger suffers damage, he may recover against the railroad company for its dereliction."

[8] *Cf.* Beale, *Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, in which the term "direct" result is used *diffusely* in imposing tort liability.

[9] 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 801-821.

[10] American Law Institute, Restatement of Contracts, § 90.

counter to the fundamental necessity of contractual "privity", the third party beneficiary doctrine also raised a new kind of affirmative duty.[11] Likewise, an agent has been held subject to tort liability for his failure to act affirmatively in relation to property under his control which may become dangerous to third persons.[12] Even in maritime law, there appears to be an affirmative duty on the part of a ship-owner to make all reasonable efforts to rescue sailors who have fallen overboard.[13]

The result of the immediate case, seeks to give sanction to Bentham's ideal that, —

> "Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience. This obligation is stronger in proportion as the danger is greater for the one and the trouble of preserving him, the less for the other".[14]

—JULIUS COHEN.

LANDLORD AND TENANT — NATURE OF HOLD-OVER TENANCY — RIGHT OF DISTRESS AS AGAINST INTERVENING CHATTEL MORTGAGE. — T during term of lease executed chattel mortgage, which was duly recorded, to secure a loan. At expiration of lease, T held over under terms of original lease and without executing a new written one. All the rent before the original lease was paid before the expiration thereof. Landlord brings action for rent accruing during hold-over term and claims priority over chattel mortgage. *Held*: Holding over created new tenancy under Code[1] and hence

[11] Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE L. J. 1008; also (1922) 31 YALE L. J. 489.

[12] Seavey, *The Liability of an Agent in Tort* (1916) 1 So. L. Q. 16, 26.

[13] BOHLEN, STUDIES IN THE LAW OF TORTS, p. 312. See also The G. W. Glenn, 4 F. Supp. 727 (1933) interpreting this liability under the Merchant's Marine Act § 33 (46 USCA) § 688.

[14] 1 BENTHAM, COMPLETE WORKS (1859) 164. See also Ames, *Law and Morals* (1908) 22 HARV. L. REV. (1908).

[1] W. VA. REV. CODE (1931) c. 37, art. 6, § 5. It is submitted that this section of the code has nothing to do with the *creation* of estates and deals only with their *termination*. It reads as follows: "A tenancy from year to year may be terminated by either party giving notice in writing to the other, at least three months prior to the end of any year, of his intention to terminate the same." The rest of the section deals with notice to terminate and the requisite formalities.

It is further submitted that the case of Allen v. Bartlett, 20 W. Va. 46, 19 A. L. R. 10, 46 n. (1882) which is cited in the annotated code as construing this section did not do so in the manner stated by the court in the principal case or in the annotated code. The only mention of this section of the code