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## Book Review

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## BOOK REVIEW

CANNIBALISM AND THE COMMON LAW. By *A.W. Brian Simpson*. Chicago: University of Chicago Press. 1984. Pp. xiv, 353. \$25.00.

*Reviewed by Frank E. Booker \**

*Regina v. Dudley and Stephens*<sup>1</sup> is probably the leading case on the question of whether necessity may be a defense in common law for the taking of human life. I know of no jurisprudential question that matches this one for its combination of profound character and dramatic interest. In *Cannibalism and the Common Law*, Professor Simpson provides an historical and legal analysis of *Dudley and Stephens* which undermines traditional assumptions concerning the nature of the case.

Very briefly, in *Dudley and Stephens*, four mariners were stranded in a tiny boat, far from land or shipping lanes, after their small ship sank in a storm. After many days, when it appeared that one of the mariners was within hours of death from exposure and privation, at least two of the others, being but a little better off, killed the sailor nearest to death. All three survivors drank his blood and ate his flesh to survive. The three were subsequently rescued by a ship, but they probably would not have lived to see the rescue ship had they not killed their companion. Was their necessity a defense to their actions?

If I understand Professor Simpson's analysis of the circumstances surrounding the trial of *Dudley and Stephens*, he intended to cast light on this case from two fresh perspectives: first, by establishing the custom of maritime survival cannibalism in the nineteenth century, and second, by documenting the astonishing procedural irregularities of the case.

The author produces a mass of material to establish that the custom of maritime survival cannibalism existed in the nineteenth century. There is, of course, no statistical means available to fully gauge the pervasiveness of this custom. Professor Simpson presents in detail a substantial number of confirmed and strongly suspected cases and also examines traces of the custom left in writing and song. Bearing in mind that this was a practice which would only arise in extraordinary circumstances, I believe it is conservative to say that, at least among British, American, and European

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1 14 Q.B.D. 273 (1884).

mariners, the custom and details of how it was to be done were well known and not infrequently resorted to in cases of ship disasters.

Professor Simpson notes that the court of learned landmen who tried Captain Dudley and his mate did not acknowledge the custom of survival cannibalism, nor did they consider that the admiralty law they probably should have applied might well have given some respect to that custom (pp. 249-50). I hesitate to put this more strongly because the author does not emphasize the point. He repeats a fascinating argument made by Sir George Baker (pp. 248-49) that admiralty law had a stronger claim for application than common law and that admiralty law included the customs of the sea. To proceed beyond this to a conclusion that a specific result would have followed under this law is impossibly speculative. The issues were not raised in the actual case. Had they been, the courts which heard the case may have rejected or avoided applying admiralty law, or the existence of the custom, or the evidence to establish the custom, or the legal acceptability of the factual custom. They may have declined to consider the custom since it was not strictly followed, no lots having been cast, by Dudley and Stephens. Even if all this could have been overcome before courts which sought to write an opinion condemning the use of deadly force against the innocent, there was (and is) no precedent to tell us whether the custom would have provided a complete defense, reduced the degree of homicide, or merely provided a mitigating circumstance. It is hard to say more than that admiralty law impartially applied may well have given some respect to the custom, had the custom been properly raised and established in a court convinced of the applicability of admiralty law.

In examining the procedural irregularities in the trial of Dudley and Stephens, Professor Simpson showed painstaking legal research and exhaustive knowledge of the law, facts, English Bench and Bar, and record. I believe readers will find this portion of the work the most interesting. The point is not merely technical, for the departures from normal procedure were essential to secure the convictions of Dudley and Stephens and were deliberately undertaken so that a leading case could be written (pp. 195-223).

The procedural irregularities examined by Professor Simpson reflect the unusual nature of the legal proceedings. These irregularities include a prosecution commenced against the initial advice of the supposedly responsible authority (pp. 8, 76-77); defects in subject matter jurisdiction of the trial court (pp. 211-12, 218, 221, 226); grave anomalies and probable defects in subject matter jurisdiction of the appellate tribunal (pp. 219-21); the revival of a procedure (the Special Verdict) unused for 100 years (p. 209); and the use of that Special Verdict by which the Judge who wrote it actually dictated it to the jury and thus deprived the prisoners of any real

jury trial (pp. 213, 227). Furthermore, after the trial, the judge altered the text of the Special Verdict to establish subject matter jurisdiction (p. 218). While American lawyers unfamiliar with English practice might tend to dismiss these findings as incredible, there is, sadly, nothing at all improbable in this account.<sup>2</sup>

Professor Simpson reprints his sources and authorities to fully support his points. He combines the research and investigative methods of the historian, the detective, and the legal scholar. I believe he is to be commended for using this broader spectrum. Legal scholarship is often limited by the artificially narrowed horizons of classical legal material.

Having done justice, I hope, to the merits of this book, I am still bound to say that I cannot recommend it as a whole. I have great respect for the thesis advanced by Professor Noonan in *Persons and Masks of the Law*,<sup>3</sup> that we need to examine the people in our cases as human beings rather than merely donors or burglars or officers. This can, however, be overdone, and it is badly overdone in this book. The author's research and investigative methods, which I have commended, led him to cast his nets on a broad and deep front into the waters of the past. He dredged up a great volume of material. I do not think he sorted it stringently enough. The family histories of the characters are pointlessly Homeric; the whole life stories of major cannibals are tedious; there is unnecessary detail and repetition. The reader is burdened with repetitive accounts of the method of preparing a shipmate's body, the history of innumerable vessels, and the hardships of the Donner party, the Greely expedition, and Alferd Packer. Every maritime incident of established or suspected survival cannibalism in the century is discussed at unnecessary length.

In short, the book is from two to three times longer than it should be. This is perhaps more a fault of the editors than of the author, for it is quite difficult to edit one's own work on a subject near one's heart. The overall effect is that while there is real gold here, the percentage per ton of ore is uneconomically low. Few will have the patience to process it. Perhaps one may hope for a revised or second edition, because there is a valuable book struggling to get out of this mass.

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<sup>2</sup> For modern day examples of similarly unusual proceedings in English courts, see Mr. Justice Humphrey's summation to the jury in the trial of Rattenbury and Stoner. TRIAL OF ALMA VICTORIA RATTENBURY AND GEORGE PERCY STONER 251-53 (F.T. Jesse 2d ed. 1950). See also the verbatim transcript of Mr. Justice Cantley strong-arming an acquittal for Liberal Party Leader Jeremy Thorpe, reprinted in *The Daily Telegraph* of London, June 19, 20 (1979).

<sup>3</sup> J. NOONAN, *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON AND WHYTHE AS MAKERS OF THE MASKS* (1976).