

In Warm Blood: Some Historical and  
Procedural Aspects of *Regina v.*  
*Dudley and Stephens*†

Lord Chief Justice Coleridge's opinion in *Regina v. Dudley and Stephens*<sup>1</sup> has long been considered the leading judicial essay on necessity as a defense to a charge of homicide. Its popularity may be credited to the combination of highly melodramatic facts and the Lord Chief Justice's obvious verbal skills. So engrossing have these been that scant attention has been paid to the historical setting of the case. This neglect is unfortunate, since a full appreciation of the case requires understanding of at least two historical circumstances.

First, Dudley and Stephens were tried in order that a precedent might be obtained which strictly limited the defense of necessity. It was, however, clearly understood at the time, both by the judiciary and the public, that the law thus obtained would not be applied to the defendants; its purpose was to preserve conventional wisdom rather than to rule the case of *Dudley and Stephens*.

Second, the procedural device of the special verdict at first appears—and is generally considered—to be an accidental reversion to an outmoded form. In fact the device was used quite deliberately in a calculated effort to move forward, not backward. It is this procedural aspect, rather than the substantive precedent, which holds the real fascination of the case.

On May 19, 1884, the nineteen-ton private sailing yacht *Mignonette* left Southampton bound for Sydney, Australia. The *Mignonette* carried four men: Thomas Dudley, 31, captain; Edward Stephens, 36, mate; Edmond Brooks, 38, seaman; and Richard Parker, about 17, apparently signed on as cabin boy *cum* apprentice seaman. The yacht's owner, Mr. Henry W. Want, of Sydney, had purchased the ship the preceding year, and commissioned Dudley to deliver it to him in Sydney; Dudley in turn had signed on the others.

The yacht called at the Portuguese island of Madeira, and then

---

† Michael G. Mallin, Class of 1968, the University of Chicago Law School.  
1 14 Q.B.D. 273 (1884).

sailed south around the westernmost coast of Africa, probably crossing the equator almost midway between Africa and South America, which are there some 4000 miles apart. From this point the vessel would have headed south-southeast across the South Atlantic to a point just below the Cape of Good Hope. In the South Atlantic, however, heavy weather forced the *Mignonette* slightly to the west of normal shipping lanes, and on July 5, a heavy sea suddenly "struck the yacht and stove in her side. Within five minutes the yacht went down . . ." <sup>2</sup> The four men escaped in a thirteen foot lifeboat. Dudley found time to rescue the ship's chronometer, sextant, and compass, but the only food taken on board consisted of two one pound tins of turnips.

The *Mignonette* sank at 27°S, 10°W, <sup>3</sup> about 1600 miles from Africa at the point where Southwest Africa meets Angola on the camelhump of the coast. The point is almost due west of Luderitz in Southwest Africa, and about 2000 miles east and 500 miles south of Rio de Janeiro.

The men rigged a makeshift sail from their clothing and headed in the general direction of Rio de Janeiro. They waited, so Brooks later testified, three days before opening the turnips. On the fourth day they caught a small turtle. They drank its blood and finished the turnips. The flesh of the turtle was made to last until the twelfth day. Thereafter the four sailed or drifted, at an average speed of about 1¾ miles per hour, without sighting a sail, without food, without shelter, and without incident. On the sixteenth day, Brooks later testified, the boy Parker became ill from drinking seawater. About this time the idea was broached—how or by whom it is not known—that one of the four should be sacrificed to preserve the others. "The subject of drawing lots had been mentioned before this [Parker's illness]. Drawing lots was not agreed to." <sup>4</sup>

It appears that Brooks was the dissenter, remarking that "he did not wish to kill anybody, and did not wish anybody to kill him." <sup>5</sup> On the eighteenth day, the fifth day without food, the question of lots was again raised and dismissed. At this juncture Dudley suggested that Parker should be sacrificed to save the others. Parker was very ill, and took no part in these discussions. On the nineteenth day Dudley and Stephens agreed to kill Parker if no rescue appeared by next morning.

<sup>2</sup> The Times (London), Sept. 19, 1884, p. 5, col. 1 (reporting the Prosecutor's case presented at Falmouth Police Court).

<sup>3</sup> The Times (London), Sept. 8, 1884, p. 9, col. 6.

<sup>4</sup> The Times (London), Sept. 19, 1884, p. 5, col. 2 (Brook's testimony at Falmouth).

<sup>5</sup> The Times (London), Nov. 4, 1884, p. 3, col. 6 (Huddleston charging the grand jury at Exeter).

At six on the morning of July 25, Stephens took over the tiller from Brooks who crawled to the bow of the boat to rest. Sometime between 6:00 a.m. and 8:00 a.m. Dudley cut Parker's throat with a two-inch penknife which he was later to ask officials if he could have "as a keepsake." Brooks claimed that he fainted when Dudley moved in on Parker. He awoke after a few minutes to find that the captain had caught most of the boy's blood in the bailer. Brooks asked for a share, and Dudley passed him the bailer. The blood was thick, partially congealed, and hard to swallow. The men next cut open Parker's belly to expose the liver, which they then ate. Thereafter, in the words of the jury, "the three men fed upon the body and blood of the boy for four days."<sup>6</sup> On July 29 the boat was boarded by rescuers from the German barque *Montezuma*. One was Julius Erich Marten Weise, who later stated that:

They were all very weak, Dudley and Stephens being the worst. He saw in the boat some small pieces of flesh, one piece of a rib, some old clothes, a chronometer, a sextant, and a compass. . . . At the moment he could not tell what sort of flesh or bones they were. They were all too excited. When the men came on board none of them said what the remains were.<sup>7</sup>

The silence did not last long. The men seem to have agreed, in the best Victorian manner, to clear their consciences by explaining to anyone who would listen just what had happened. The *Montezuma* returned the men (and their boat) to Falmouth in Cornwall, where they arrived on September 6, 1884, and where they immediately repeated to customs officials the whole of their story.

The foregoing account is a composite of the various statements made by the three survivors of the *Mignonette*. While there are some inconsistencies in their stories, particularly as to the role of Brooks, it is generally agreed that Dudley did the act, that Stephens assented and was willing to participate, though his assistance was not required, and that Brooks was cowering in the bow at the time. His lack of acquiescence, as distinct from his lack of participation, appears to have made a less than forceful impression on the others. The men were also unclear as to whether Parker was killed on the eighteenth, nineteenth, or twentieth day. In the end, the twentieth day seems to have

---

<sup>6</sup> 14 Q.B.D. 273, 274 (1884).

<sup>7</sup> The Times (London), Sept. 19, 1884, p. 5, col. 2.

been agreed on by consent of the three, and, incidentally, the prosecution.

Upon arriving in Falmouth on Saturday, September 6, 1884, Dudley immediately told the story to the Collector of Customs, in the presence of the Harbour Police. He was promptly arrested, somewhat to his surprise, for "he was evidently under the impression that he would be able to return home the same night."<sup>8</sup>

On Monday, September 8th, the three appeared in Falmouth Police Court, charged with murder. The eight magistrates heard testimony from a Falmouth Harbour Police Sergeant concerning the statements made by Dudley. The Sergeant requested a remand "until he had received instructions from the Treasury."<sup>9</sup> This was granted. The prisoners' counsel requested bail, but, after some hesitation, this was denied. On the 11th, in a crowded courtroom which counted Parker's brother among the spectators, the Crown asked for a further remand. Counsel for the defense consented to the request for a postponement but asked the magistrates to reconsider the question of bail for the prisoners, arguing that they were "only technically charged with the highest offence a man could commit against the laws of England," and quoting Mr. Justice Stephen, that "homicide is also justifiable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish."<sup>10</sup> The argument apparently carried some weight with the magistrates; bail was set at two hundred pounds for Dudley and one hundred pounds each for Stephens and Brooks. "The decision," the *Times* correspondent noted, "was received with applause in a crowded court."<sup>11</sup>

The Treasury clearly felt compelled to prosecute, although the case had already become a *cause célèbre*, and the defendants objects of intense public sympathy. Mr. W.O.J. Danckwertz, Junior Treasury Counsel, was assigned the task of presenting the case to the magistrates of Falmouth Police Court.

The facts were not only clear, but were by now known to the world. But known facts are not, of course, legal evidence. Looking at the case with a professional eye, Mr. Danckwertz may have been momentarily disconcerted. His star witnesses were all defendants. Relying on their own testimony to convict them was out of the question. Under the common law in 1884 the "privilege against self-incrimination" took

<sup>8</sup> The *Times* (London), Sept. 19, 1884, p. 5, col. 2.

<sup>9</sup> The *Times* (London), Sept. 9, 1884, p. 3, col. 5.

<sup>10</sup> 4 STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 101 (1st ed. 1841).

<sup>11</sup> The *Times* (London), Sept. 12, 1884, p. 4, col. 5.

the form of an absolute bar to defendants' personal testimony.<sup>12</sup> The prosecution could, and did, introduce the statements made by the prisoners to the customs official. But these were subject to the objection, later raised, that they were taken under the Merchant Shipping Act and intended for use only by the Board of Trade, not for criminal enquiries. The customs official had certainly not warned the accused that their words could be used against them. At the hearing this objection was overruled; but the prosecutor may still have pondered the hazard that his case might evaporate in court. What he needed was a prosecution witness to the murder itself.

Mr. Danckwertz must have noticed that his weakest case was against Brooks. All concurred that Brooks had not actually agreed to participate. Further, Brooks' statements had shown a much greater concern for his own safety than had those of Dudley and Stephens. So when he appeared in Falmouth Police Court on Thursday, September 18, Mr. Danckwertz was able to announce that:

As to Brooks, having carefully considered his position, he had come to the conclusion that in point of law probably Brooks would have to be acquitted, and therefore he proposed to offer no evidence against him, and to ask the Bench to discharge him that he might be called to give evidence.<sup>13</sup>

The Bench complied.

The witnesses for the prosecution that day were: the arresting officer, who testified to the conversation he heard between the customs officer and Dudley; the Collector of Customs, who introduced the written statements taken from Dudley; a seaman from the *Montezuma*, who testified about the remains found in the lifeboat and the physical condition of the men rescued; and Brooks, who testified about the events, the ill health of Parker, his own nonparticipation, the difficulties of swallowing congealed blood, and Dudley's insistence on telling all.

After these witnesses were heard, Dudley and Stephens were committed for trial at winter assizes. The prisoners reserved their defense

---

<sup>12</sup> "It has now, however, been decided that defendants jointly indicted and given in charge to the jury, and being tried together, cannot be called as witnesses for or against each other, notwithstanding anything contained in 14 & 15 *Vict. c. 99 ss. 2, 3*, that statute not having altered the practice of the English law, that a prisoner *on his trial* shall not be examined or cross-examined. *R. v. Payne, L.R.*, 1 *C.C.R.* 349; 41 *L.J. (M.C.)* 65 . . . . The better course, where it is sought to obtain the testimony of a defendant as against his co-defendants, is either to enter a *nolle prosequi* . . . or to apply for a verdict of acquittal before opening the case . . ." ARCHIBALD, *CRIMINAL CASES* 318 (20th ed. 1886).

<sup>13</sup> *The Times* (London), Sept. 19, 1884, p. 5, col. 1.

and again applied for bail, which was granted on the same terms as before.

Winter assizes for Cornwall and Devon were held in Exeter, Devon, about ninety miles from Falmouth. The judge at this term was Baron Huddleston, one of the fifteen judges of the Queen's Bench. The title Baron was a judicial title, referring to a "Baron of the Exchequer," an office abolished by statute soon after Huddleston was invested. The title, however, expired only with the expiration of its owners, and Huddleston, with the flair for phrasing of a first-rate criminal lawyer, which he was, was given to calling himself "the last of the Barons."<sup>14</sup>

The "last of the Barons" had middle-class Dublin beginnings, matriculated at Trinity without obtaining a degree, and in time found his way to Grey's Inn, where he was called to the bar in 1839. He established a high reputation as a criminal lawyer, amassed considerable wealth, and late in life married the daughter of the Duke of St. Albans. He was a member of four exclusive London clubs, a devotee of the turf, and a fan of the theatre, particularly French theatre. The *Dictionary of National Biography* says—somewhat ruefully—that "he was greater as an advocate than as a judge," but hastens to add that "his charges [to the jury] were always models of lucidity."<sup>15</sup>

Before this somewhat flamboyant Baron a grand jury met on Monday, November 3, 1884, to consider whether there was sufficient evidence against Dudley and Stephens to warrant a true bill for murder. Huddleston outlined to them the facts of the case, read the statement made at Falmouth by Dudley, whom he described as "a man of exemplary character, great experience, and courage," and concluded: "It seems clear that the taking away of the boy's life was carefully considered, and amounted to a case of deliberate homicide."<sup>16</sup> He then launched into an examination of the legal precedents. Puffendorf's case of the English sailors he rejected for lack of "a reliable report." *United States v. Holmes*<sup>17</sup> was distinguished because there it was held that drawing lots would be justifiable, and that system was rejected here; furthermore, he said, the case is not authority, and the notion there suggested of lots as an appeal to providence "would seem almost to verge upon the blasphemous." The Criminal Code Bill Commissioners' report was quoted to the effect that there is no clear precedent, and Stephen's *History of the Criminal Law* cited for the

<sup>14</sup> 10 *DICTIONARY OF NATIONAL BIOGRAPHY* 144 (1937-1938).

<sup>15</sup> *Ibid.*

<sup>16</sup> This and the following account is taken from *The Times* (London), Nov. 4, 1884, p. 3, col. 6.

<sup>17</sup> 15 Fed. Cas. 383 (No. 15) (C.C.E.D. Pa. 1842).

proposition that this was a case of first impression and "the Judges would practically be able to lay down any rule which they consider expedient." From this proposition, the Baron laid down his rule that necessity only embraces self-defense. He then instructed the grand jury that, in effect, they had no choice but to return a true bill, and concluded:

No person who has read the details of this painful case but must be filled with the deepest compassion for the unhappy men who were placed in this frightful position. I have only in this preliminary stage to tell you what the law is, but if you should feel yourselves bound to find the bill, I shall then take care that the matter shall be placed in a form for further consideration if it becomes necessary. I think I am bound to do this after the reports of the cases I have mentioned in Puffendorf and in the American reports, and the report of the Criminal Law Commissioners. The matter may then be carefully argued, and if there is any such doctrine as that suggested the prisoners will have the benefit of it. If there is not, it will enable them, under the peculiar circumstances of this melancholy case, to appeal to the mercy of the Crown, in which, by the Constitution of this country (as a great lawyer points out), is vested the power of pardoning particular objects of compassion and softening the law in cases of peculiar hardship.<sup>18</sup>

The grand jury returned a true bill, and three days later Dudley and Stephens appeared before Baron Huddleston and a jury, charged with murder. After the opening statement for the Crown,<sup>19</sup> Huddleston must have surprised both barristers more than a little by announcing that while, if the jury returned a general verdict of guilty, he would reserve the case under the Crown Cases Reserved Act, he would suggest to the jury an alternative procedure: they could find a special verdict, *i.e.*, make a statement of the facts of the case, and refer to the court the question whether those facts constituted murder.<sup>20</sup>

The prosecution proceeded, calling Brooks, who testified as to the facts and "as to the terrible suffering they all endured. He considered at the time the deed was done there was no reasonable prospect of relief coming to them."<sup>21</sup> Following this, the Falmouth statements were introduced, and there the prosecution rested.

---

<sup>18</sup> The Times (London), Nov. 4, 1884, p. 4, col. 1.

<sup>19</sup> The following account is taken from The Times (London), Nov. 7, 1884, p. 11, col. 4.

<sup>20</sup> See text accompanying notes 35-42 *infra* for a discussion of these procedures.

<sup>21</sup> The Times (London), Nov. 7, 1884, p. 11, col. 4.

Mr. Collins opened for the defense by challenging jurisdiction on the ground that the statute referring to crimes on the high seas was limited to "british ships," and a "ship" under the Merchant Shipping Act was any vessel "not propelled by oars." His Lordship reserved the point.<sup>22</sup> Mr. Collins proceeded with the defense, which was based on the argument that self-preservation justified the deed, and the men clearly did not think they were committing a criminal offense.

Mr. Charles replied for the Crown, and, as the *Times* reported:

His lordship [Baron Huddleston], in summing up, remarked that the jury were bound to accept the law of the land as laid down by him, and were not at liberty to disregard his ruling, though invited to do so by the learned counsel for the defense. It struck him, however, that they might be as anxious as he was that the subject should receive the highest interpretation it could receive in this country and he would ask them therefore to find the facts in a special verdict . . . . The learned counsel for the defence had contended that not only might such a necessity arise as would justify a body of men in sacrificing the life of one of their number in order to save the remainder, but that in some cases of necessity they might be justified in sacrificing the weakest. He felt bound to say that on all grounds of law or morality he entirely dissented from that argument. There was no such doctrine in the law any more than that necessity was a justification for theft, though it might be a very good reason for imploring the clemency of the Crown. After commenting at some length on the facts . . . his Lordship added that if he were to ask them to find a direct verdict they would have no alternative but to obey his direction and return one of wilful murder. By the course he proposed, however, they would be relieved of that painful duty, while they would be at liberty to add to their finding any general expression of feeling on behalf of the prisoners which they might think desirable.<sup>23</sup>

The jury thereupon returned the special verdict most of which was cited in Lord Coleridge's famous opinion. The verdict, however, apparently concluded: "[A]ssuming the necessity to kill anyone, there was no greater necessity for killing the boy than any of the other three men; but whether, upon the whole matter, the prisoners were

---

<sup>22</sup> The issue does not appear again in precisely this form. Jurisdiction was argued, however—presumably on more informed grounds—before the Queen's Bench. See text accompanying note 51 *infra*.

<sup>23</sup> The *Times* (London), Nov. 7, 1884, p. 11, col. 4.



and are guilty of murder, the jury are ignorant, and refer to the Court.”<sup>24</sup> The addendum (“if . . . the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder”) was not part of the jury’s verdict, but was subsequently added to the record. On appeal, the addendum was admitted over objection on the ground that it was “implicit” in the verdict.<sup>25</sup>

The most remarkable feature of the trial was surely neither the gruesomeness of the facts nor the stringency of Huddleston’s interpretation of the law, but rather the use of the special verdict, which, as Huddleston himself later said, had not been used in a criminal case for “almost 100 years”<sup>26</sup>—actually eighty-nine years. The obvious course for a trial judge was the one which Huddleston mentioned as an alternative: to direct the jury to return a verdict of guilty and reserve the case under the Crown Cases Reserved Act of 1848.<sup>27</sup> This act provided that a trial judge might “in his or their Discretion, reserve any Question of Law which shall have arisen on the Trial for the Consideration of the Justices of either Bench and Barons of the Exchequer.” At least five of these Judges or Barons were needed for a quorum, including either the Lord Chief Justice of Queen’s Bench or the Lord Chief Justice of the Exchequer.

The obvious course, then, was for Huddleston to direct the jury to return a verdict of guilty. This, to the general astonishment of the legal world, he did not do. His reasons were the subject of wide and sometimes ludicrous speculation. One legal journal suggested that he wished to be free to let the prisoners out on bail and could not do so under the Crown Cases Reserved Act.<sup>28</sup> But the Act specifically provided that “the Court in its discretion . . . shall take a Recognizance of Bail.” Another respectable journal averred that Huddleston was trying to deprive the jury of their “irrational prerogative of mercy” by not letting them return a general verdict.<sup>29</sup> This is highly improbable. Huddleston’s forte was addressing a jury, and by the time he finished telling them, in the best Victorian tradition, of the necessity to carry out the heavy burden of their duty, of his intention to reserve the case that it might “receive the highest interpretation it could receive in this country,”<sup>30</sup> and of the impending clemency of the Crown, it is

---

<sup>24</sup> *Id.* at col. 5.

<sup>25</sup> 1 T.L.R. (n.s.) 118, 119-20 (Q.B.D. 1884); see text accompanying notes 52-53 *infra*.

<sup>26</sup> See text accompanying note 40 *infra*.

<sup>27</sup> 11 & 12 Vict. c. 78.

<sup>28</sup> 19 L.J. 742 (1884).

<sup>29</sup> The Times (London), Dec. 10, 1884, p. 3, col. 3.

<sup>30</sup> See text accompanying note 23 *supra*.

unlikely that they would have acquitted. Victorian juries customarily convicted in hardship cases, confident of royal reprieve.

It is true that by the way Huddleston posed the choice between conviction and special verdict, he effectively deprived the prisoners of a chance of acquittal. But it is unlikely that he considered this. As Huddleston viewed the matter, the jury could only convict or bring in a special verdict. That they would, under his instructions, undoubtedly follow the latter course indicates Huddleston's genuine interest in the procedural device itself, certainly not his blood lust nor his fear of losing control of a jury.

A word should be said here about the mechanism of reprieve. It is beyond doubt that by his allusions to "the clemency of the Crown" before both the grand and the trial jury, Huddleston was deliberately assuring that Dudley and Stephens would be reprieved. The "royal prerogative of mercy" was by this time exercised by the Home Secretary, and while some aspects of his use of this power have been considered random, there have always been a few clear rules. Fenton Bresler quotes Spencer Walpole, three times Home Secretary, as saying in 1866 that the Home Office "always followed the recommendation of the Judge as respects a mitigation of a sentence."<sup>31</sup> Again, the Home Secretary Sir Frank Newsom is quoted as saying in 1950: "The Home Secretary always attaches weight to a recommendation to mercy by a jury, and he would be very reluctant to disregard such a recommendation, if it is concurred in by the judge."<sup>32</sup> Bresler adds: "[W]here the judge agreed with the jury a reprieve was refused in only six English cases in fifty years [1900-1950]."<sup>33</sup>

It is therefore certain that both Huddleston and his juries knew that whatever they might do, the lives of Dudley and Stephens were not at stake. As the *Times* explained editorially on the day after the trial:

The matter will be heard in the Court above, we may assume, with every disposition to give the prisoners the benefit of any doubt as to the law. Even should they be pronounced technically guilty of the offence charged against them, we may be sure that the prerogative of pardon will be exercised; in this instance it would be impossible, in view of the expression of opinion of the jury to allow the Law to take its course.<sup>34</sup>

---

<sup>31</sup> BRESLER, REPRIEVE—A STUDY OF A SYSTEM 58 (1965).

<sup>32</sup> *Id.* at 113.

<sup>33</sup> *Ibid.*

<sup>34</sup> *The Times* (London), Nov. 7, 1884, p. 10, col. 2.

The problem remains as to why Huddleston chose to play this well understood charade in such a bizarre manner. Understanding his purpose requires realization of the shortcomings of the Crown Cases Reserved Act. In his *History of the Criminal Law of England*, Sir James Stephen wrote:

Special verdicts have now gone almost entirely out of use, having been superseded by the establishment of a court called the Court for Crown Cases Reserved. . . .

. . . .

[In this procedure] . . . no provision whatever is made for questioning the decision of a jury on matters of fact. However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.

This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in itself, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places every one concerned, and especially the Home Secretary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon to exercise what really are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious, but it is difficult to find a satisfactory remedy.<sup>35</sup>

The shortcomings of the Court of Crown Cases Reserved must have been well known to Huddleston; nor could he be a stranger to the above critique published the year before the *Dudley and Stephens* case, by his fellow judge Stephen. Thus fortified by the criticisms of existing procedural law among his brethren on the Bench, Huddleston seems to have intended to effect legislative reform by judicial fiat. He seems to have thought that by the mechanism of special verdict he could undermine the restriction limiting the Court of Crown Cases

---

<sup>35</sup> STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 311-13 (1883).

Reserved to questions of law. Thus, in addressing Counsel and jury at the Court in Exeter, he said:

If the jury, acting on his direction found the men guilty, the case would be reserved under the Crown Cases Reserved Act. There was, however, another course not often adopted in modern days, but of which there were repeated instances in former times, and that was to obtain from the jury a special verdict, *finding all the facts, so that all the facts could be reviewed by the Court above*, to whom would be referred the question as to whether, in point of law, the prisoners were guilty or not, and the jury would be spared the pain of returning a verdict of guilty.<sup>36</sup> [Emphasis added.]

The theory that Huddleston was attempting to amend the procedural devices for criminal appeals is given added credibility by the obscure case of *Queen v. Staines Local Board*,<sup>37</sup> in which Huddleston once again utilized the device of a special verdict. That case involved an action against a local sanitary authority for failing, despite statutory notice, to close certain drains and thereby contributing to pollution of the Thames. This was a criminal offense under the Thames Navigation Act,<sup>38</sup> involving as penalty a heavy fine.<sup>39</sup> The Board defended on the theory that the users of the drains had acquired prescriptive rights over them, and the Board consequently did not have the authority to close them.

The arguments in the case were heard by Baron Huddleston, and then:

[S]ome discussion took place as to what, under the circumstances, would be the best manner in which to obtain a finding upon the facts, so as to enable the legal questions in the case to be most conveniently raised and settled. Finally, at the suggestion of Sir Henry James it was agreed that the case should be adjourned to enable the counsel on either side to prepare a special verdict.

Mr. Baron Huddleston said that he thought the course to be taken a very good one, although a very ancient one. It was almost 100 years since a special verdict was taken, except in the Mignonette case, which he had tried at Exeter. . . . That

---

<sup>36</sup> *The Times* (London), Nov. 7, 1884, p. 11, col. 4.

<sup>37</sup> 4 T.L.R. 364 (1888).

<sup>38</sup> 29 & 30 Vict. c. 89, § 63.

<sup>39</sup> One hundred pounds for the first day of the offence, fifty pounds per diem thereafter. *Ibid.*

plan was adopted there, and he had taken a great deal of trouble in obtaining a proper form.<sup>40</sup>

It is interesting to note that Sir Henry James, who represented the Board, had in 1884 been the Attorney General,<sup>41</sup> and had therefore had the obligation of arguing before the Queen's Bench the propriety of the special verdict in *Dudley and Stephens*. In addition, Sir Henry must have been particularly close to Huddleston, for the Baron named him in his will as co-executor of his estate. For both these reasons, Sir Henry James must have had an unusually clear notion of what Baron Huddleston had tried to accomplish in *Dudley and Stephens*, and his readiness to apply the same procedure in *Staines* may well indicate sympathy with the effort.

In charging the jury in the *Staines* case, Huddleston left little doubt as to what he viewed as the advantages of a special verdict:

Mr. Baron Huddleston, addressing the jury, said that the defendants had raised a very nice point of law for argument, which by the course taken would be more conveniently raised. They had in this country no Court of Appeal in criminal cases. But by resorting to the very ancient form of taking a special verdict such an appeal was in effect obtained, and would be decided by the Court for Crown Cases Reserved on a future day.<sup>42</sup>

If Huddleston's intentions are correctly perceived, at least two questions arise. First, why was *Dudley and Stephens* chosen as the vehicle for this effort? Second, why was this procedure not more widely adopted if the need for reform was widely appreciated?

The first question is easily answered. The wide publicity given the case because of its peculiar facts made it an ideal vehicle for bringing Huddleston's innovation to the attention of bar and bench. Further, as a practical matter, if the device turned out to be procedurally unsound no great harm would have been done since everyone appreciated that *Dudley and Stephens* were to be reprieved in any case. Thus, if on the one hand the case had to be dismissed for procedural error, it would not have resulted in setting free dangerous criminals; on the other hand, if a conviction resulted which was later considered unsound (due, for example, to a deprivation of jury trial), no great harm would have resulted to *Dudley and Stephens*. In the light of this latter point it is interesting to remember Huddleston's repeated

---

<sup>40</sup> 4 T.L.R. 365 (1888).

<sup>41</sup> Gladstone's government fell in 1885.

<sup>42</sup> 4 T.L.R. 365 (1888).

references to the royal prerogative, and to note that Sir Henry James, who argued the propriety of the procedure, was adamant in insisting upon a reprieve when the question was before the Home Secretary.<sup>43</sup>

Why was the innovation not adopted by the bar or the bench? Partially this seems due to the failure of the bar to perceive what was involved. Legal periodicals, as we have seen, adopted fanciful explanations for Huddleston's behavior while ignoring his own indications at the trial. The bar generally seemed more interested in quibbling over the admittedly substantial procedural problems raised than in examining the possibilities of the innovation on its merits. A more essential reason for failure, however, may have been Huddleston's inability to appreciate the temper required for judicially innovated reforms. While the arguments outlined above for using *Dudley and Stephens* as a vehicle for sweeping reform may have appealed to Huddleston, with his criminal lawyer's flair for the dramatic gesture, he failed to understand of the judicial process that it frequently prefers to edge into innovation by the back door, so as not to be accused of usurping legislative authority. A seemingly insignificant precedent like the *Staines* case might have been adopted and expanded by other decisions; *Dudley and Stephens* was too open, too grandiose, and consequently it exists today as an oddity in the law, a sweeping precedent which has never been followed either in its substantive or its procedural innovations. In this context we may recall of Huddleston the judgment of the *Dictionary of National Biography*: "He was greater as an advocate than as a judge."

The procedural difficulties Huddleston left in his wake had to be dealt with by the five judges who convened on December 4, 1884, sitting, Lord Chief Justice Coleridge announced, as the Queen's Bench.<sup>44</sup> This announcement was more than mere rhetoric. The judges might have been expected to sit as a Court of Crown Cases Reserved. Indeed, one legal journal missed this fine distinction and reported the case under the heading "Crown Cases Reserved."<sup>45</sup> But the authority of the Crown Cases Court was limited by statute to points reserved by the trial judge, whereas the special verdict set the court free to range over procedural and substantive issues. Further, there was a technical problem in bringing the record before the Court. At one time this would have been done by writ of certiorari, which the Court of Crown Cases Reserved did not have the power to grant. In any event, the writ was not used because a legislative reorganization of the judicial system

---

<sup>43</sup> See text accompanying note 41 *supra*.

<sup>44</sup> *The Times* (London), Dec. 5, 1884, p. 3, col. 3.

<sup>45</sup> 54 *Law J. Rep. M.C.* 32.

had technically incorporated the assizes into the Queen's Bench, and consequently it was deemed sufficient to transfer the case from one bench to another by order of the Queen's Bench. Whether the Court of Crown Cases Reserved could have so ordered is, at best, dubious.

Since the only discernable difference between the five judges sitting as a Court of Crown Cases Reserved and the same five judges sitting as the Queen's Bench was that the latter had—or took—more procedural license than might otherwise have been available, it is pardonable to blur the distinction. Huddleston may have wished to do so deliberately; in any event, when the *Staines* case came up four years later he told the jury that it would be decided by the Court of Crown Cases Reserved.<sup>46</sup>

The five judges who had to cope with Huddleston's procedural brainchild included Baron Huddleston himself, the excellent Lord Chief Justice Coleridge, and Judges Grove, Denman and Pollock. As the proceedings began<sup>47</sup> on December 4th, the prosecutor, Sir Henry James, inquired as to whether the prisoners should appear in court. Lord Coleridge thought that "they had better be here"<sup>48</sup> and so ordered, and they were brought in. The record of the lower court was read; it concluded with the special verdict.

Mr. Collins, barrister for the defendants, raised two objections to the record. First, he objected to the words "a registered English vessel," and "belonging to said yacht," as not having been part of the original special verdict found by the jury. Sir Henry James conceded that the words had been "added from the learned [trial] judge's notes."<sup>49</sup> He evidently considered this a proper procedure, but went on to say that as the words were immaterial he would consent to their omission.<sup>50</sup> Whether this was an oversight by James or merely an example of his confidence in the outcome is not clear, but what he had consented to was the omission from the record of any specific reference

<sup>46</sup> See text accompanying note 42 *supra*.

<sup>47</sup> The following account of the December 4 proceedings is drawn from four sources: 14 Q.B.D. 273; 15 Cox Crim. Cas. 624; 33 Weekly Rptr. 350; and The Times (London), December 5, 1884. Each has a slightly different version according to the interests of the various reporters. The author has tried to construct a complete picture by drawing on the most detailed sections of each.

<sup>48</sup> 33 Weekly Rptr. 348 (1884).

<sup>49</sup> 14 Cox Crim. Cas. 626-27 (1884).

<sup>50</sup> The sentence in question, with omitted words bracketed, reads: "The jurors, upon their oath, say and find that, on the 5th day of July, 1884, the prisoners, with one Brooks, all able-bodied English seamen, and the deceased, also an English boy, between seventeen and eighteen years of age, the crew of an English yacht [a registered English vessel], were cast away in a storm on the high seas, 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat [belonging to the said yacht]." 15 Cox Crim. Cas. 625.

to the national registration of the *Mignonette*, thus opening the door to Collins' argument that: "Now that the record is amended, there is nothing to show that there is jurisdiction in the court to try the defendants. . . . The boat in which the defendants were may have been a foreign—a Chinese—boat."<sup>51</sup> Collins saved this objection, however, until he had put (and lost) his substantive arguments.

The second objection to the record involved the words appearing in the last paragraph after "pray the advice of the court thereupon."<sup>52</sup> Collins contended that these were not part of the original special verdict, and Huddleston readily conceded that: "I drew up the special verdict and read it to the jury. The words objected to were not in it. But there is authority for amending a special verdict if the words which are desired to be added are important: *R. v. Hazel*, 1 Leach Cr. Cas. 368."<sup>53</sup> Lord Coleridge was ready to see the words struck out, considering their presence or absence immaterial, but Denman sided with Huddleston on the propriety of amending a special verdict, and the record was allowed to stand.

It should be noted that the judges were under some pressure to reach a unanimous decision. A dissenting opinion might have forced the case to a decision by the entire Queen's Bench<sup>54</sup>—a most cumbersome procedure. In retrospect, however, it seems that Coleridge's view on the issue was preferable. As a practical matter it surely made no difference whether the words were added—their omission would have changed nothing. But the addition certainly does say rather more than the jury wished to say, and it might have been more politic to leave it implicit. The popularity of the special verdict device would not have been enhanced by these liberties with the jury's efforts.

Collins next objected that the record was not brought before the court by certiorari, but this argument was summarily rejected.<sup>55</sup>

James then made the prosecution's argument that only self-defense justified homicide; necessity did not. Coleridge stated that James' view of the law was, in the Court's opinion, correct "unless it can be shown by the defendants to be otherwise."<sup>56</sup>

Collins then cited the arguments for a wider view of necessity—arguments with which the Court was surely familiar. He touched on Stephen's *Digest*, *Commonwealth v. Holmes*, Bracton, Russell, Black-

<sup>51</sup> 33 Weekly Rptr. 350 (1884).

<sup>52</sup> See text accompanying note 24 *supra*.

<sup>53</sup> 33 Weekly Rptr. 348 (1884).

<sup>54</sup> See Stephen, *op. cit. supra* note 35, at 312.

<sup>55</sup> See text following note 45 *supra*.

<sup>56</sup> 33 Weekly Rptr. 349 (1884).



stone, Hale, Hawkins, East, and Lord Mansfield. At this point Huddleston interjected his observation that: "Sir Michael Foster (1 Dis. Ch. 2, 5.8, p. 216) has all the cases on this subject, and these cases do not support your defense."<sup>57</sup> Coleridge added a disparaging comment, and Pollock joined the rest. Collins, correctly perceiving that he had lost on the substantive issue, quickly shifted to procedural issues by raising his objection to jurisdiction based on *R. v. Keyn*,<sup>58</sup> and the omission of reference in the record to the registration of the *Mignonette* and, more particularly, its lifeboat. Pollock replied by citing a statute to the effect that "all offenses against property or person, committed either ashore or afloat, out of her Majesty's dominions, by any seaman, who, at the time when the offense is committed, or within three months previously, has been employed in any British ship, shall be punished as if the offense had been committed within the Admiralty of England."<sup>59</sup>

Although Dudley and Stephens were surely covered by the statute, the technical claim involved—that the record did not state facts sufficient to establish jurisdiction—was not directly met. Since the record could be amended by the Court, several of the Judges considered this a moot point. In the written opinion Lord Chief Justice Coleridge distinguished *R. v. Keyn* and added that the minority opinion there had later been incorporated into a statute, 41 & 42 Vict. c. 73. But this tidying up effort still did not dispose of the problem of the record.

Finally, Collins objected that the Crown Cases Reserved Act "did away with special verdicts."<sup>60</sup> Judge Denman replied quite accurately that there were no such words in the statute, and there the matter ended. It was true, of course, that the bar in general had assumed that the Crown Cases Reserved Act superseded the special verdict system,<sup>61</sup> but there was no language in the statute to that effect, and the procedural consequences of reading that meaning into the statute at this stage might have seemed extremely complex. Further, as a practical matter the same five judges sitting as a Court of Crown Cases Reserved and dealing with the same substantive issue would clearly have reached the same result.

Coleridge next stated: "We are all of the opinion that the prisoners are guilty of murder,"<sup>62</sup> and that the prosecution need not offer argu-

<sup>57</sup> *Id.* at 350.

<sup>58</sup> 2 Ex. D. 63 (1876).

<sup>59</sup> See 17 & 18 Vict. c. 104, § 267.

<sup>60</sup> *The Times* (London), Dec. 5, 1884, p. 8, col. 5.

<sup>61</sup> 1 STEPHEN, *op. cit. supra* note 35, at 311. See also 78 L.T. 40 (1884).

<sup>62</sup> 33 Weekly Rptr. 350 (1884).

ment in reply. James asked the Court to pass sentence. Both Coleridge and Huddleston seemed somewhat taken aback at this, asking whether the case should not be sent back to the assize for judgment and sentence. James, however, was confident of his precedents, and on the basis thereof he submitted that the court should immediately pass sentence. This was undoubtedly proper as procedural matter according to the statutes and precedents of the time.<sup>63</sup> It was also most fair to the prisoners, who, everyone understood, were to be reprieved as soon as possible after their conviction. To delay their conviction and sentence for a formal judgment back in Exeter would only have prolonged their uncertainty. But in waiving that requirement, James and the court which accepted his advice probably dealt a death blow to Huddleston's grand reform. The notion of trial—and judgment—by jury, with its implication of a jury's "prerogative of mercy" in the face of the facts, is, and has long been, deeply embedded in the English speaking world's concept of justice. By creating a situation in which the special verdict became an alternative to a general verdict, rather than a supplementary procedure, James undoubtedly contributed to its subsequent unpopularity.

The final issue before the Court was whether it should pass sentence immediately or allow four days "to move in arrest of judgment." It was James' opinion that the Court could act immediately but, meeting opposition from the bench, he concluded that it was within the discretion of the Court to adopt either procedure. The Court, clearly wanting time to marshal the most compelling case for its decision, opted without hesitation for delay. The prisoners were formally convicted; sentence was to be imposed four days later.

On December 9, 1884, the Court reconvened. Lord Coleridge read his beautifully written opinion, which has ever since been quoted as authority on the subject of necessity, and pronounced sentence of death. He did not wear the black hat customarily used on such occasions, for no one wished to intimidate Dudley and Stephens. The opinion included an explicit reference to royal prerogative, thus adding its weight to Huddleston's many such statements below. So that no one might miss the point, the very passing of sentence incorporated its own denial:

---

<sup>63</sup> Lord Devlin, in his lecture series published as *Trial by Jury*, says (p. 89) "When a criminal jury returns a special verdict, the judge cannot enter judgment himself but must direct the jury as a matter of law what general verdict—Guilty or Not Guilty—it ought to return on the basis of the facts it has found: so that the last word remains with the jury." DEVLIN, *TRIAL BY JURY* 89 (1956). Whatever the modern authority for this may be, it was not the law in 1884. Had it been so, the future of the special verdict might have been brighter.

You have been convicted of the crime of wilful murder, though you have been recommended by the jury most earnestly to the mercy of the Crown; a recommendation in which, as I understand, my learned brother who tried you concurs, and in which we all unanimously concur. It is my duty, however, as the organ of the Court, to pronounce upon you the sentence of the law, and that sentence is—that for the crime of which you have been convicted, you be taken to the prison whence you have come, and that, on a day appointed for the purpose of your execution, you be hanged by the neck until you be dead.<sup>64</sup>

In proper perspective, the judgment of the Queen's Bench is probably more interesting in its procedural aspects than for its treatment of the substantive issue. While counsel for the defense relied on a great many citations in arguing his substantive point, it was undoubtedly true, as Huddleston said below, that this was in fact a case of first impression. As such, it required a rule of judge-made law which in theory would be arrived at by adversary adjudication. By removing the genuineness of threat to Dudley and Stephens through the royal prerogative system, the judges left themselves freer than they might otherwise have been to decide the case on abstract rather than human—or even realistic—considerations. A *Times* editorial admirably set out the abstract conventional wisdom on this subject in Victorian England:

The English law as laid down by Baron Huddleston is adverse from entertaining the notion that peril from starvation is an excuse for homicide; and it would be dangerous to affirm the contrary, and to tell seafaring men that they may freely eat others in extreme circumstances, and that the cabin boy may always be consumed if provisions run short . . . . Would the three men have waited so many days and endured the agony which they bore so long if they had been well aware that killing by hungry men was not murder, and if they had not grown up with the belief that killing a human being was all but universally criminal?<sup>65</sup>

<sup>64</sup> The *Times* (London), Dec. 10, 1884, p. 3, col. 5.

<sup>65</sup> The *Times* (London), Nov. 7, 1884, p. 10, col. 2. The *Times* continued: "It would have been very much like folly on their part to have refrained if the excuse which Mr. Collins put forward on behalf of the prisoners is valid—that they were entitled to kill the boy as soon as their lives were in danger, that is, as soon as they were extremely hungry. Where is the doctrine of necessity in this loose sense to lead if once it is enshrined as law? It must be, for reasons still stronger, a good excuse for crimes of a less serious nature than murder. A man would only have to plead extreme poverty to be free to steal.

The gap between this conventional wisdom and the actual treatment of Dudley and Stephens is one of those phenomena which may be written off to Victorian hypocrisy or merely accepted as human inconsistency. The important conclusion is that had Dudley and Stephens' lives really been in the balance, adjudication might have produced quite different results.

This is all the more true of the procedural decisions involved. The judges could have established a substantive precedent and still freed the defendants on a procedural ground, albeit at the cost of some embarrassment to Huddleston. It is arguable that this is the proper function of procedural technicalities. That this was not done is again attributable to the expectation of executive clemency. The judges were permitted—indeed invited—by the system to establish the precedent without anyone having to pay the cost. Understood in this light, even the procedural precedents are reasonable.

As it happened, the calculated reprieve had a few uncertain moments in the Home Office. Reprieves were then—and are now—the ultimate decision of the Home Secretary alone.<sup>66</sup> The Home Secretary in Gladstone's last cabinet was Sir William Harcourt. Sir William was a conscientious and excellent Home Secretary, and an unusually liberal one. His biographer reports that "John Bright has described him as the most humane Home Secretary he ever encountered," and details at some length his admirable treatment of prisoners.<sup>67</sup> On the matter of *Dudley and Stephens*, however, he suffered what his biographer was pleased to call "an occasional aberration." While recognizing the need to commute the death penalty, he still favored severity. He resisted the pressure of public opinion, and complained to James: "The judgment of the Court in this case pronounces that to slay an innocent and unoffending person is not a justification or excuse, and it is therefore upon moral and ethical grounds . . . that the law repels the loose and dangerous ideas . . . that some acts are venial or indeed anything short of the highest crime known to the law."<sup>68</sup>

Harcourt appears to have taken the judges more seriously than they took themselves. One may surmise, perhaps, that Harcourt also resisted the fact that the Court, having made its proverbial bed, was not obliged to lie in it. James, however, who as prosecutor was closer

---

Juries might hold it a necessity to take the necessaries of life, and every hungry man would have leave and license as to all bakers' shops if the relieving officer were not at hand. As soon as one such exception is admitted we quit solid ground . . ."

<sup>66</sup> BRESLER, *op. cit. supra* note 30, at 57.

<sup>67</sup> I GARDINER, *THE LIFE OF SIR WILLIAM HARCOURT* 394 (1914).

<sup>68</sup> *Id.* at 410.

to the realities of the case, was adamant in his insistence on reprieve. On December 5, 1884, he wrote to Harcourt: "If you announce a commutation to penal servitude for life or even to any other term, you will never be able to maintain such a decision and you will have to give way."<sup>69</sup>

In the end, Harcourt did give way. The sentence was commuted to six months,<sup>70</sup> although it is unclear whether the men actually served any of that time.

Thus this long story has a happy ending. The judges obtained their precedent, Dudley and Stephens their freedom, Harcourt his continued reputation for humanity, and society its inconsistent ends. Only Huddleston and the much needed reforms he sought seem somewhat slighted. For though the procedural precedent supported Huddleston's notions, it lay dormant, and was finally rendered superfluous by the Criminal Appeals Act of 1907.

---

<sup>69</sup> *Ibid.*

<sup>70</sup> *The Times* (London), Dec. 15, 1884, p. 6, col. 4.