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Homicide--Aiding and Abetting--Moral Duty to Act

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its decision on the fact that the founding fathers intended the use of the paper ballot.

The case which the court cites to sustain its position is *Nicholas v. Minton*,[3] in which the Massachusetts court held a similar act invalid. The constitutional requirements were that officers "shall be chosen by written votes" and that those commissioned to conduct the election shall "sort and count the votes, and form a list of the persons voted for, with the number for each person against his name" and "make a fair record of the same" and "a public declaration thereof."

It is submitted that it is possible to distinguish the two cases because of the difference in the two constitutional provisions. A marked vote is not a written one; a deposited vote is not one to be sorted and counted. There may be sufficient compliance with the Kentucky constitution without a paper ballot which is marked. The same result required by the constitution, a secret ballot, is reached by the use of the machine. The word "marked" is defined by Webster's New International Dictionary as "indicated". The same authority defines "deposited" as "put" or "lay down". When a voter operates a voting machine, he indicates his choice and puts it down on the recording apparatus in much the same manner as if he had marked a ballot and deposited it in a ballot box. Bearing in mind the definitions of the words given and the principle of construction which the court recognizes in the case, that language of the constitution which is capable of expansion will be so interpreted and held adaptable to the conditions of present day society,[4] it is submitted that the Kentucky Constitution should be held to authorize the use of voting machines.

JOHN PAUL CURRY, JR.

HOMICIDE—AIDING AND ABETTING—MORAL DUTY TO ACT.

Defendant became engaged in a roadside fight with deceased at a dance. W entered the fight to aid defendant. Defendant thereupon withdrew from the fight and ordered the crowd which had gathered to stand back. Deceased died from knife wounds inflicted by W, and the trial court convicted both defendant and W of voluntary manslaughter. Upon appeal the decision of the trial court was affirmed with the following comment: "He (defendant) stood by and looked on and saw his large, strong companion stab (deceased) to death and did nothing to prevent it and commanded the crowd to stand back and nobody bother them, thereby aiding and encouraging W in stabbing (deceased) and deterring bystanders from interfering and preventing W from killing (deceased)." *Wright v. Commonwealth*, 272 Ky. 77 (1938).

This case is illustrative of the extent to which our law has

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[3] 196 Mass. 410, 82 N. E. 50 (1907); *Contra*, Opinion of the Justices, 178 Mass. 605, 60 N. E. 129 (1901).

[4] 117 S. W. (2) 918, 920.

encroached upon moral obligation in establishing legal reason for punishment.

Defendant's duty to protect deceased from death at the hands of W was, at most, a moral obligation, and, although the failure to act is definitely reprehensible, it cannot subject defendant to punishment at the hands of the law.[1] And the fact that the altercation between defendant and deceased was primarily responsible for bringing on the fatal encounter is immaterial.[2] Then the only real issue for consideration here is whether a command by an unarmed man to a crowd of men to prevent interference with a roadside brawl will be sufficient to warrant a conviction of manslaughter as aider and abettor when the brawl results in the homicide of one of the participants.

It may safely be declared as the law in this Commonwealth that one may aid and abet the crime of manslaughter, and that the principal actor, the aider and abettor, and the accessory before the fact are all principals in the first degree and equally guilty, and may be so accused and convicted.[3] However, to make defendant an aider and abettor, he must do or say something showing his *consent* to the felonious purpose and *contributory to its execution.*[4] The consent in itself is not sufficient, since it does not come up to the meaning of the words "aid and abet".[5]

The effect (contribution to the execution of the felonious purpose) of defendant's command to the crowd, though indicative of his consent to the actions of W, would seem to be practically insignificant as compared to the effect of the possession of a dangerous weapon by W himself. It seems more reasonable to believe that the crowd was afraid to approach the contestants due to possession of a dangerous weapon by the enraged and half-crazed W than it was afraid of the commands of the unarmed defendant. Then it would seem that the underlying factor in this conviction lies in the prevalence of a pronounced moral turpitude.

Nevertheless, there is a legal presumption prevalent in this Commonwealth which lends legal reason to the conviction. When one is present encouraging, assisting, or advising another to do an unlawful act, regardless to what degree such advice, assistance, or encourage-

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[1] People v. Beardsley, 150 Mich. 206, 113 N. W. 1128 (1907); Rex v. Smith, 2 C. & P. 449, 12 E. C. L. 668 (1825).

[2] Landrum v. Commonwealth, 123 Ky. 472, 96 S. W. 587 (1906).

[3] Polly v. Commonwealth, 15 K. L. R. 502, 24 S. W. 7 (1893); Tucker v. Commonwealth, 145 Ky. 84, 140 S. W. 73 (1911).

[4] Karnes v. Commonwealth, 125 Va. 758, 99 S. E. 562 (1919); Chapman v. State, 43 Tex. Cr. Rep. 328, 65 S. W. 1098 (1901); Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370 (1853).

[5] "There is a plain distinction between consenting to a crime and aiding and abetting in its perpetration. Aiding and abetting are affirmative in their character; consenting may be a mere negative acquiescence, not in any way known to the principal malefactor." White v. People, 81 Ill. 333, 337 (1876).

ment is effective, the law presumes that the one acting is induced to commit the act by the presence and encouragement of the other.[6] And, although moral turpitude played the major role in the conviction, this presumption affords legal reason to the decision.

J. WIRT TURNER.

[6] Bast v. Commonwealth, 124 Ky. 747, 99 S. W. 978 (1909).