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A STATUTORY STUDY OF SELF-DEFENSE AND DEFENSE OF OTHERS AS AN EXCUSE FOR HOMICIDE

Self-defense has roots almost as ancient as Anglo-American jurisprudence. Originally it served merely as grounds for a pardon from the king, but eventually it came to be accepted at law as an excuse for homicide.[1] This acceptance at common law has become a significant part of the law of homicide today. The purpose of this note is to survey the modern statutory treatment of self-defense and to submit, on the basis of that survey, a model statute.

It is significant that, of the 48 states, 29 have enacted statutes concerning self-defense.[2] Of the states that do have such statutes, Texas and Tennessee stand at the extremes as to extensiveness of treatment. The Texas statute, which is much too lengthy to set out here, contains six different articles, written in nineteen paragraphs and covering defense of property, prevention of felonies and duty to retreat, among other subjects.[3] On the other side, the Tennessee statute states simply:[4]

> "If any of the acts mentioned in the last two sections be done in self defense, or without malice aforethought, the provisions of the law do not attach."

The statutes of the 27 other states fall somewhere between these extremes. Perhaps the most typical is that of Missouri, which reads:[5]

> "Homicide shall be committed justifiably when committed by

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[1]Note, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903); Note, 39 KY. L.J. 469 (1951).

[2]Those states having no such statutory enactments are: Alabama, Connecticut, Delaware, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, West Virginia, Wyoming.

[3]TEX. STAT. CODE CRIM. PROC. arts. 1222-1227 (Vernon 1948).

[4]TENN. CODE ANN. §10779 (Williams 1934).

[5]MO. REV. STAT. ANN. §4379 (1939). Very similar if not identical with this provision are the following: FLA. STAT. §782.02 (1951); MINN. STAT. §§610.05, 619.29 (1943); N. J. REV. STAT. tit. 2, c. 138, §6 (1937); N. D. REV. CODE tit. 12, §2705 (1943); OKLA. STAT. ANN. tit. 21, §733 (1941); S. D. CODE §13.2003 (1939); VT. REV. STAT. §8245 (1947); WASH. REV. STAT. ANN. §2406 (Remington 1932); WIS. STAT. §340.29 (1949). Some of the above statutes also have stipulations permitting killing in suppression of grave felonies.

> any person in either of the following cases: First, in resisting any attempt to injure such person or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or, Second, when committed in the lawful defense of such person, or of his or her husband or wife, parent, child, brother, sister, uncle, aunt, nephew, niece, apprentice, master, mistress or servant, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury and there shall be reasonable cause to apprehend immediate danger of such design being accomplished; or, Third, when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace."

This type statute apparently represents an attempt to codify in many respects the common law concerning self-defense. That such attempts have led to a considerable divergence in result is indicated by the fact that only six states affirmatively permit defense of others, irrespective of blood or kin.[6] It would appear that at least five other states, however, could allow this privilege by statutory interpretation of the language used.[7] Twelve states appear to limit the right to defend another to those persons related to the defender, such as ward, master, servant, and the like.[8]

A further analysis reveals that while a considerable number of cases speak of a duty to retreat as an important aspect of the problem,[9] none of the statutes, except that of Texas, incorporate any

[6]IOWA CODE §691.1 (1946); LA. CODE CRIM. LAW & PROC. ANN. §740-20 (Dart 1943); MISS. CODE ANN. §2218 (1942); NEV. COMP. LAWS §10080 (1929); N. Y. PENAL LAW §1055; WASH. REV. STAT. ANN. §2406 (Remington 1932).

[7]ARIZ. CODE ANN. c. 43, §2908 (1939); CAL. PEN. CODE §197 (Deering 1949); IDAHO CODE ANN. tit. 18, §4009 (1948); ILL. REV. STAT. c. 38, §§366-367 (1947); UTAH CODE ANN. tit. 103, c. 28, §10 (1943).

[8]FLA. STAT. §782.02 (1951); KANS. GEN. STAT. ANN. c. 21, §404 (1935); MINN. STAT. §610.05 (1945); MO. REV. STAT. ANN. §4379 (1939); N. J. REV. STAT. tit. 2, c. 138, §6 (1937); N. M. STAT. ANN. c. 41, §2411 (1941); N. D. REV. CODE tit. 12, §2705 (1943); OKLA. STAT. ANN. tit. 21, §733 (1941); ORE. COMP. LAWS ANN. tit. 23, c. 1, §417 (1940); S. D. CODE §13.2003 (1939); VT. REV. STAT. §8245 (1947); WIS. STAT. §340.29 (1949).

[9]People v. Durand, 307 Ill. 611, 139 N.E. 78 (1923); State v. Grimmett, 33 Nev. 531, 112 Pac. 273 (1910); Fowler v. State, 80 Okla. Cr. 130, 126 Pac. 831 (1912); Earles v. State, 94 S.W. 464 (Tex. 1906); State v. Donahue, 79 W. Va. 260, 90 S.E. 834 (1916).

provision, pro or con, concerning this subject.[10] In the case of an aggressor, however, eleven states have provided that to claim the right of self-defense, the aggressor must have in fact endeavored to decline any further struggle before the mortal blow was given.[11] Although it is not the intention of the writer to consider the problem of killing in defense of property, it is interesting to note in passing that eleven states have, by statute, granted this privilege.[12]

Speaking generally of the statutes previously surveyed, it is submitted that, while each may have a certain amount of merit, none presents a clear, complete statement of the law of self-defense. One is immediately confronted with three basic problems in attempting to set out such a statement. The first, the drafting of a simple definition, presents little difficulty. Most of the statutes now on the books are adequate in this respect. The second problem involves the question of "retreat." The English view, brought to this country quite early, was that if one who was murderously assailed could escape the attack by retreating, he was under a duty to do so rather than to stand his ground and perhaps kill.[13] Today, however, there exists a wide divergence in the decisions. Cases may be found holding that any person not a trespasser[14] may stand his ground against an assailant,[15] except where the slayer sought or commenced the affray.[16] Conversely, other cases require retreat where the slaying occurs as the result of a mutual encounter or sudden affray.[17] It is not the writer's intention

[10]TEX. STAT., CODE CRIM. PROC. art. 1225 (Vernon 1948). Texas here holds flatly that one may stand his ground.

[11]ARIZ. CODE ANN. c. 43, §2908 (1939); ARK. STAT. ANN. tit. 41, §2236 (1947); CAL. PEN. CODE §197 (Deering 1949); COLO. STAT. ANN. c. 48, §§42-44 (1935); GA. CODE ANN. tit. 26, §1014 (Supp. 1951); IDAHO CODE ANN. tit. 18, §4009 (1948); ILL. REV. STAT. c. 38, §§366-367 (1949); MONT. REV. CODES ANN. tit. 94, §2513 (1947); NEV. COMP. LAWS §10080 (1929); N. Y. PENAL LAW §1055; UTAH CODE ANN. tit. 103, c. 28, §10 (1943).

[12]ARIZ. CODE ANN. c. 43, §2908 (1939); CAL. PEN. CODE §197 (Deering 1949); COLO. STAT. ANN. c. 48, §§42-44 (1935); GA. CODE ANN. tit. 26, §1013 (Supp. 1951); IDAHO CODE ANN. tit. 18, §4009 (1948); ILL. REV. STAT. c. 38, §§366-367 (1947); IOWA CODE §§691.1-691.3 (1946); MONT. REV. CODES ANN. tit. 94, §2513 (1947); N. M. STAT. ANN. c. 41, §2411 (1941); ORE. COMP. LAWS tit. 23, c. 1, §417 (1940); UTAH CODE ANN. tit. 103, c. 28, §10 (1943).

[13]1 HALE, PLEAS OF THE CROWN 481 (1778); Note, 16 HARV. L. REV. 567 (1903).

[14]Macias v. State, 36 Ariz. 140, 283 Pac. 711 (1929).

[15]Enyart v. People, 67 Colo. 434, 180 Pac. 722 (1919).

[16]Hatch v. State, 57 Kan. 420, 424, 46 Pac. 708, 709 (1896).

[17]Jones v. State, 22 Ala. App. 472, 116 So. 896 (1928); *see* State v. Lucas, 164 N.C. 471, 474, 79 S.E. 674, 675 (1913).

to go completely into this subject, which in itself would be ample basis for a separate note. However, it is submitted that any flat rule requiring or denying a duty to retreat overlooks the variance of circumstances which would make the rule just in one situation, unjust in another. As Justice Holmes said in effect, the duty to retreat should be a circumstance to be considered with others in each individual case to determine whether the defendant went farther than he was justified in going.[18] It is on this basis that the Texas statute may be criticized, since it categorically disaffirms any duty to retreat. However, the already cited division existing among American courts would seem to indicate that proper statutory enactment would be of assistance.

The final problem to be met in constructing a workable statute on self-defense would seem to be that concerning the defense of third persons. Here, too, is found a split in the decisions, the divergence in statutes having already been pointed out. One view holds that the right to defend another is limited to those related to the one defended by blood or marriage, or to those under the supervision of the defender.[19] Still another view places no such limitation on that right.[20] Here again, without attempting to exhaust the subject fully, it is suggested that the proper view should place no such limitation on the right of one to defend a third person. It is generally conceded that one is justified in killing to prevent a felony.[21] As a matter of practical effect, whenever there is a homicide in the defense of a third person, there will generally be an attempt at a felony by the person attacking. Therefore it is believed that it is incorrect to hold that a defendant cannot kill in defense of a stranger, since the fact that the attacker in such cases was about to commit a violent felony usually gives him a defense.[22] Suppose, however, a situation were to exist in which the defender was mistaken as to the intention of the attacker or believed that the one who was in fact the aggressor was the person attacked. It is believed that in situations of this kind the better view is that a defendant who had a reasonable belief that the party he defended was acting without fault should be acquitted. Those cases

[18]State v. Brown, 256 U.S. 335 (1921); Note, 39 KY L.J. 353 (1951).

[19]Forman v. State, 190 Ala. 22, 67 So. 583 (1914); State v. Anderson, 222 N.C. 148, 22 S.E.2d 271 (1942).

[20]People v. Dugas, 310 Ill. 291, 141 N.E. 769 (1932); State v. Henessey, 29 Nev. 320, 90 Pac. 221 (1907).

[21]1 WARREN, HOMICIDE §147 (1938).

[22]Note, 39 KY. L.J. 460 (1951).

which support this view[23] are based upon the existence of a reasonable belief in the mind of the defender rather than the actual state of facts. A basic premise of the law of homicide is that in the absence of criminal negligence a criminal intent must be present to constitute a crime.[24] This being so, it is submitted that one acting under mistaken belief of fact arrived at without negligence, and certainly without the requisite intent, should not be made subject to criminal liability.[25]

In summation, then, it is submitted that a satisfactory statutory treatment of self-defense should include a clear definition of the substantive right and in addition a treatment of the problems of "retreat" and defense of others. It has been noted that none of the present statutory enactments are adequate in this respect, the more lengthy ones offering little more aid than the shorter statutes. In view of this fact, the following is offered as a possible legislative solution to the problem:

Sec. ____ Self-defense:

(a) A homicide is legally excusable when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm, and that the killing is reasonably necessary to save himself from that danger. Failure to retreat shall not categorically establish that the killing is not reasonably necessary but shall be one fact to be considered by the jury in determining whether the defendant acted under such reasonable necessity in view of all the circumstances.

(b) A homicide is further excusable when the slayer kills in defense of any person reasonably believing that the person defended could have used such measure himself.

(c) An aggressor in an affray may claim self-defense when, but only when, he withdraws in such a way as to indicate to his adversary his intention to quit the conflict.

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[23]Guffee v. State, 8 Tex. Cr. 187 (1880); see also Willingham v. State, 72 Ga. App. 372, 33 S.E.2d 721 (1945); State v. Harper, 149 Mo. 514, 51 S.W. 89 (1899).

[24]1 DISHAM, CRIMINAL LAW §§301, 303 (9th ed. 1923).

[25]For a more complete discussion of this problem see Note, 39 KY. L.J. 460 (1951).