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## DEFENSE OF THIRD PERSONS AS EXCUSE FOR HOMICIDE

In the criminal law, self defense is an affirmative defense to homicide. Under proper circumstances, one is justified in taking the life of another because of the inherent right of man to protect himself from the unlawful assaults of others.<sup>1</sup> Closely related to the right of self defense is the right to defend third persons. This right is not so well defined as the more common one of self defense. That there is a moral right to assist others in the repulsion of unwarranted assaults cannot be denied; the problem is under what circumstances can this right be a legal defense to homicide. This problem admits of two phases, (1) who is capable of asserting this right and, (2) what can he do under his exercise of it?

## (1) WHO CAN EXERCISE THIS RIGHT?

There is some question as to whether this right extends to every person who chooses to come to the aid of his fellow human or only to persons standing in a special relationship to the party defended. There are many general statements 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 such as parent, child, wife, brother or servant.<sup>2</sup> As a practical matter, in the majority of the cases, the defender will stand in one of these relationships to the person defended. One is more likely to come to the defense of a relative than to the aid of a stranger, but, if one has killed while defending a stranger, should he be refused the protection of the defense? There are jurisdictions which see no such limitation on the right.<sup>3</sup> Which of these viewpoints is the more logical guide?

As a matter of practical effect, in those jurisdictions which deny that there is any right on the part of a stranger to assist a third person *in his defense*, there is yet a way to acquit a defendant when he has killed doing just that. It is generally admitted that one is justified in killing in order to prevent the commission of an atrocious felony.<sup>4</sup> This right has been interpreted as the greater right as compared to the right to assist others in their defense,<sup>5</sup> and, therefore, the power to exercise it has been extended to all persons rather than to persons of a class. Moreover, some jurisdictions which now impose a class limitation on the right to *defend* third persons justify a homicide when it is in the prevention of a violent felony.<sup>6</sup> Violent felonies such as murder, rape and felonious assault have to be committed upon people. When one intervenes in such a situation and kills in order to prevent such a felony, is he not also necessarily acting in the defense of the victim? Conversely, his *intention* may be solely one of defense of the third person, and his acts may only incidentally operate to prevent the felony. As a matter of practical effect when there is a homicide in the defense of a third person, there is also apt to be an attempt at a felony by the attacker. It is submitted that it is untenable to rationalize that the defender was not justified in killing

<sup>1</sup> 2 BURDICK, LAW OF CRIME sec. 436 et seq. (1946).

<sup>2</sup> 1 WARREN ON HOMICIDE sec. 161 (1938).

<sup>3</sup> Forman v. State, 190 Ala. 22, 67 So. 583 (1914); State v. Anderson, 22 N. C. 148, 22 S.E. 2d 271 (1942); State v. Hewitt, 205 S. C. 207, 31 S.E. 2d 257 (1944); 26 AM. JUR. 265.

<sup>4</sup> People v. Dugas, 310 Ill. 291, 141 N.E. 769 (1923); State v. Hennessy, 29 Nev. 320, 90 P. 221 (1907).

<sup>5</sup> 1 WARREN ON HOMICIDE sec. 147 (1938).

<sup>6</sup> A homicide to prevent a violent felony is said to be a killing by the execution of the law while one in the defense of a third person is not. 1 HALE P. C. 484.

<sup>7</sup> Storey v. State, 71 Ala. 329, 340 (1882).

since he was interposing in behalf of a stranger, but that the fact that the attacker was about to commit a violent felony saves him from a denial of a defense. Any person who elects to come to the aid of his fellow man should be protected if he kills while engaged in the legitimate *defense* of such third person.<sup>8</sup> Such defense is legitimate whenever he reasonably believes that the third person is in danger of death or great bodily harm, because these are threatened violent felonies.<sup>9</sup> So, if he proceeds with his defense on a theory of defense of third persons, he should be able to maintain it and should not be required to resort to the other defense which views him as a prosecutor of the law rather than the defender that he is.

## (2) WHAT IS THE EXTENT OF THIS RIGHT?

It has been observed that there is a right of one to come to the defense of a third party which ought to extend under certain circumstances to any person assuming the role of a protector. The next problem is the extent or that right; more specifically, what facts are necessary to enable this right to constitute a perfect defense when one coming to the aid of another kills in the process?

There are two distinct theories as to the extent of this right? The first and the majority rule is that the slayer can have no better defense than the defended party would have had or that the defender "stands in the shoes of the third party."<sup>10</sup> When one has killed in a jurisdiction applying this view, he does not have a perfect defense if the defender was at fault in bringing about the difficulty or if the defender was actually the aggressor.<sup>11</sup> The opposing theory is that one is justified in the homicide if the defender, acting as a reasonable man, believed that the person defended was in immediate danger of death or great bodily harm and that the affray was not due to that person's own wrongdoing.<sup>12</sup> In the jurisdictions adopting the second and minority theory, one may successfully defend a prosecution for criminal homicide when the party defended has been guilty of unlawful conduct in bringing about the combat or was actually the attacker since the defense consists of the reasonable belief in the mind of the defender, not the actual state of facts.

Those jurisdictions following the majority rule invariably reach for the argument that to acquit a defendant who has had a reasonable belief that the third party was without fault can, in instances, result in the killing of an innocent man without any criminal liability. Thus, in *More v. State*,<sup>13</sup> the court sustains its position of applying this narrow rule with the classic example:

"It may be said that this rule may in exceptional circumstances work hardship; however, the opposite rule would allow an innocent man who had been forced to strike in self defense to be killed with impunity merely because appearances happened to be against him at the moment a relative of his antagonist reached the

<sup>8</sup> MAY, CRIMINAL LAW sec. 62 (4th ed. 1938).

<sup>9</sup> Self defense involves fear of death or grievous bodily harm. Each of these is fear of a violent felony—the first that of homicide, the second that of mayhem.

<sup>10</sup> *Humphries v. State*, 28 Ala. App. 159, 181 So. 309 (1938); *Turner v. State* 128 Ark. 565, 195 S.W. 5 (1917); *Pacheco v. People*, 96 Col. 401, 43 P. 2d 165 (1930); *State v. Anderson*, 222 N. C. 148, 22 S.E. 2d 271 (1942); *State v. Francis*, 152 S. C. 17, 149 S.E. 348 (1929); *Cooper v. State*, 123 Tenn. 37, 138 S.W. 826, 851 (1911); 31 W. VA. LAW Q. 74.

<sup>11</sup> See cases in note 10, *supra*.

<sup>12</sup> *State v. Harper*, 149 Mo. 514, 51 S.W. 89 (1899).

<sup>13</sup> 25 Okla. Cr. 151, 219 P. 175, 178 (1923).

scene of the conflict. We deem it our duty to enforce rather than to relax the rule, which admits of no justification for taking human life except necessity."

It is to be observed that this argument makes no reference to any criminality *on the part of the defender*. The sole theme is that an innocent man has been slain and someone ought to be punished for it, but the law does not always punish for the intentional killing of an innocent man. When the court refers to the rule which admits of no justification for taking human life except necessity, it is alluding, apparently in this instance, to the rule that one may kill to prevent the commission of a violent felony when there is no other apparent method of prevention with a reasonable belief that such an act is imminently to be perpetrated.<sup>14</sup> Under this rule, the death of an innocent man is not always avenged by the law since the basis of the defense is a reasonable belief that a felony is about to be committed.<sup>15</sup>

Those jurisdictions following the minority rule recognize that there should be additional factors for criminal liability other than the intentional killing of an innocent man.<sup>16</sup> A criminal intent or mind is an essential element of a criminal homicide in the absence of a criminal negligence.<sup>17</sup> Why, then, should one who under a mistake of fact formed without negligence be submitted to criminal liability? It may be argued that criminal liability in such a situation will result in the prevention of deaths of innocent men at the hands of defenders who make mistakes of fact. It has been observed, however, that criminal courts cannot prevent such mistakes except in a most general way by pronouncements which are not widely read.<sup>18</sup> Furthermore, if persons fail to act because of a lack of absolute certainty as to the state of facts, are not innocent men apt to be killed for lack of defenders?

It is submitted that to refuse the defense to one who has killed with a reasonable belief that the defended was in immediate danger of death or great bodily harm without fault on his part is an unsound encroachment upon fundamental principles of criminal liability. The obvious justice afforded by the rule is recognized in the case of *Guffee v. State*<sup>19</sup> where the lower court had instructed that the right of one to defend his brother was equal to that but no more than the brother's right of self defense. In condemnation of the instruction, the court stated:

"The inherent vice of this extract from the charge of the court is, that it bound appellant to his brother with hooks of steel, and made him answerable for the acts of his brother, as well as for his own, without regard to the motive or intent, which may have been totally dissimilar in the breast of each. Throughout the transaction the (defended) may have been actuated by a malicious motive, a heart regardless of social duty and fatally bent on mischief, while the intent of the appellant may have been of a wholly different nature and character. Can it be said that in that event the same degree of culpability must attach to him as if his purpose had been

<sup>14</sup> See *Collegina v. State*, 9 Okla. Cr. 425, 132 P. 375, 379 (1913).

<sup>15</sup> 1 WARREN ON HOMICIDE sec. 147 (1938).

<sup>16</sup> See note, 72 U. OF PA. LAW REVIEW 325 (1924).

<sup>17</sup> A mistake of fact formed without fault or negligence prevents the formation of a criminal intent. 1 BISHOP, CRIMINAL LAW sec. 301, 303 (9th ed. 1923).

<sup>18</sup> MAY, CRIMINAL LAW, *op. cit. supra* note 8, sec. 62.

<sup>19</sup> 8 Tex. Cr. App. 187, 206 (1880).

the same as that of his brother? If so, one of the fundamental principles of criminal jurisprudence must be ignored and set at naught. If my brother seeks out his enemy upon the public highway with a view to slay him, and I, ignorant of his design as well as the cause of the difficulty and how it originated, but seeing him hotly engaged and the fortune of the fight turning against him, and realizing that he is in imminent danger of life or limb, rush to his rescue, and strike down his antagonist in order to save his life, must I, under such circumstances, be adjudged guilty of murder with express malice, merely because my brother would be so adjudged in case he had inflicted the mortal blow? If the law is so written in the books, we have failed to discover it. Nature has written her own law differently in the hearts of men."

Since the "stand in the shoes" rule in defense of third persons is in conflict with the fundamental principle of criminal law that one cannot be guilty of criminal homicide in the absence of criminal intent or negligence, it is submitted that it should yield to the rule that one may kill in the defense of a third person when he has a reasonable belief that the person defended is in imminent peril of death or great bodily harm without fault on his own part.

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#### INSANITY AS A DEFENSE TO CRIME

If one who is subjected to criminal prosecution proves to the satisfaction of the jury that he was insane at the time of the commission of the act, he will stand absolved from all criminal liability. If the crime is one which requires a criminal intent, the defense of insanity negatives the existence of such intent.

In the preponderance of crimes, two elements are essential for conviction—act and intent. Except in "attempts," an act is not susceptible to a great degree of uncertainty: it is there to be seen and needs only to be proved to the jury. The intent or mental element of crime is an entirely different proposition. It can be seen by no one, and the boundaries of mentality or insanity are necessarily susceptible to much uncertainty. That the subjective element of crime is such an elusive thing is probably the reason that insanity is an affirmative defense to crime in about twenty-two states.<sup>1</sup> In the jurisdictions adhering to this majority rule, the defendant has the burden of proof of convincing the jury that he was insane, rather than the lighter burden of going forward with the evidence on insanity. Perhaps the reason behind this rule is that it is a matter of popular and judicial belief that many persons relying on the defense of insanity are perfectly sane, and that if the ultimate burden of proof of sanity were on the prosecution, it would afford an easy avenue of escape to the guilty. However, the doctrine of *mens rea*, which is a fundamental concept in the criminal law, stands unequivocally for the proposition that a mental element is an indispensable component of the majority of crimes. If the doctrine of *mens rea* is as fundamental as it is pur-

<sup>1</sup> Nineteen states and the Federal courts place the burden of proof on the prosecution. WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 151, 158 (1933). MAY, *CRIMINAL LAW* sec. 47 (4th ed. 1933).

<sup>2</sup> *Williamson v. Norris*, 1 Q. B. 7 (1899). 1 BISHOP, *CRIMINAL LAW* sec. 287 (9th ed. 1923). For a complete analysis of the doctrine, see Sayre, *Mens Rea*, 45 *HARV. L. REV.* 974 (1932).