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# The Historical Development of Self-Defense as Excuse for Homicide

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sions. However, the courts should always be aware of a duty on their part to examine new tests for insanity which may be offered by the psychological and psychiatric professions and to accept any new rule which is the superior of the old. In the law of insanity, it must be recognized that the psychologists and the psychiatrists are the ones who must point the way.

JAMES DANIEL CORNETTE

### THE HISTORICAL DEVELOPMENT OF SELF-DEFENSE AS EXCUSE FOR HOMICIDE

No concept in the law seems clearer than the right of a man to kill in the necessary defense of his own life. This basic idea seems so fundamental as to admit no room for question. And yet an examination of the history of self defense reveals a startling difference between its present state and its early origin.

From the very beginning of the jurisdiction of the king's courts over criminal cases, homicide was justifiable and consequently without penalty only where committed in execution of the law.<sup>1</sup> Such cases as killings under the king's warrant, or in the pursuit of justice, or the killing of an outlaw, or a thief caught in the act, or other manifest felon who resists capture would seem always to have been justifiable. The penalty for all other cases of homicide was plainly and simply death or mutilation and even as late as the 19th century in England the law provided for forfeiture of goods and payment of fines to the king, although for a long time the rule had not been enforced.<sup>2</sup>

In the case of self defense however, the king might and often did grant pardons<sup>4</sup> notwithstanding the fact that the judges must convict the defendant of felony as the law required.<sup>5</sup> The following is an illustrative case:

"Robert of Herthdale, arrested for having in self defense slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody, as before, for the king must be consulted about this matter."<sup>6</sup>

<sup>1</sup> Beale, *Retreat From a Murderous Assault*, 16 HARV. L. REV. 568 (1903). But see, 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 478 (2d ed., 1911) where a housebreaker was killed and the slayer was allowed to go free. Even the authors term the defendant here as fortunate.

<sup>2</sup> POLLOCK AND MAITLAND, *supra*, note 1. Sayre, *Mens Rea*, 45 HARV. L. REV. 980 (1931). It would appear that this privilege did not extend to cases where the felon made no resistance. But see Staffordshire Collections iv. p. 215, as quoted by POLLOCK AND MAITLAND, *supra*, note 1, at 478, fn. 4, in which one who beheaded a fleeing robber was acquitted.

<sup>3</sup> POLLOCK AND MAITLAND, *supra*, note 1 at 481. For a discussion of the ancient scheme of *wer* and *bloodfeud*, *bot* and *wite*, and its part in the administration of criminal justice see POLLOCK AND MAITLAND, *supra*, note 1, at 449. For an excellent discussion of the primitive concept of indiscriminate liability, see, Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 317 (1893). "The doer of a deed was responsible, whether he acted innocently or inadvertently, because he was the owner, even though the weapon was wielded by a thief."

<sup>4</sup> The king of course might grant pardons for other types of homicide and as his power grew the practice of giving pardons was relied on by the judges. It is to be noted however that these pardons did not come as a matter of right but rather *'de gracia sua et non per iudicium'*. B.N.B., pl. 1216 as quoted in Beale, *supra*, note 1 at 568, fn. 4.

<sup>5</sup> Sayre, *supra*, note 2 at 980; POLLOCK AND MAITLAND, *supra*, note 1 at 479.

<sup>6</sup> SELDEN SOCIETY, 1 SELECT PLEAS OF THE CROWN, No. 70 (1888).

Another case rather clearly shows the fear in the medieval mind, acquired perhaps from observation and experience, that the king in his wisdom might *not* be pleased to grant the pardon:

"Howel the Markman, a wandering robber, and his fellows assaulted a carter and would have robbed him, but the carter slew Howel and defended himself against the others and escaped. And whereas it is testified that Howel was a robber, let the carter go quit thereof. And note that he is in the parts of Jerusalem, but let him come back safely, quit of that death."<sup>7</sup>

Thus even though perhaps there was no need to resort to the king's pardon in this particular case, the carter felt it wise to flee.<sup>8</sup>

It would appear, however, that even in the early days there was some slight appreciation of the manifest unjustness of having one who killed in self-defense or through misadventure stand on the same footing with one who killed with deliberate malice.<sup>9</sup> By the 18th century the use of the king's pardon was accepted as the means of overcoming the substantive problem presented by the law which still did not recognize self-defense or misadventure as an excuse to the charge of homicide.<sup>10</sup> The following is a case of the times:

"Roger of Stanton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the king, and the king moved by pity pardoned him the death. So let him be set free."<sup>11</sup>

Apparently the procedure followed was for the person charged with homicide to obtain a writ from the king ordering the sheriff to take an inquest as to whether there was a felony or whether a case of self-defense or misadventure was presented. At other times the justices themselves held the inquest without a writ from the king. But in either case if the jurors returned a favorable verdict, a pardon was granted by the king as a matter of course.<sup>12</sup>

This procedure was changed however in 1278 by the Statute of Gloucester. After this Statute the defendant no longer applied to the king for a writ but instead went directly before the justices. The justices then, along with the jury determined whether in their opinion the case was one of self-defense.<sup>13</sup>

*Id.*, No. 145. As to the dire legal effect of fleeing as related to forfeiture, see POLLOCK AND MAITLAND, *supra*, note 1, at 481.

<sup>8</sup> Beale, *supra*, note 1 at 568, lists old cases in which one, who as here, kills a robber in self defense and is acquitted, while a woman who kills to defend herself from rape is not. It would appear that in the case here cited, the carter would gain his acquittal as a matter of right, for as this note points out, from an early date one might kill to protect himself from robbery. This would seem to be a sort of extension of the early concept of justifiable homicide. This case also serves to illustrate the distinction previously mentioned, between homicide in execution of the law and homicide *se defendendo*.

<sup>9</sup> Sayre, *supra*, note 2 at 981.

<sup>10</sup> *Id.* at 980.

<sup>11</sup> *Supra*, note 6, No. 114. Other instances of pardon for self defense and misadventure, as well as mental defect may be found in the *Patent Rolls of Henry III*, as quoted by POLLOCK AND MAITLAND, *supra*, note 1, at 480. Enough may be found in fact to indicate that such pardons were fairly common.

<sup>12</sup> POLLOCK AND MAITLAND, *supra*, note 1, at 480.

<sup>13</sup> *Id.* at 481. In this connection the Statute provided: "This may be two ways (speaking of the defendant's right to plead), either when he is indicted of Murder or Homicide, and the Jury find it *se defendendo*, or when he is specially

In case the jurors found a verdict of homicide by self-defense, it was to be reported to the king who would, the Statute said, "take the accused into his grace, if it pleased him."<sup>14</sup>

It is to be strictly noted, however, that the defendant in these cases of self-defense needed the pardon of the king to be acquitted and that furthermore even where the pardon was obtained, the necessity of forfeiting his goods and chattels was not dispensed with.<sup>15</sup>

At exactly what point in history these pardons of the king became a matter of right the records do not reveal. It is clear, however, that the Chancellor more and more signed pardons in the king's name and that courts of equity eventually took jurisdiction in such cases.<sup>16</sup> As a consequence, pardons in cases of self-defense became largely a matter of course in equity.

In 1509 the law had progressed to such a state that by virtue of the statute of 24 Henry VIII<sup>17</sup> forfeiture of goods and chattels was dispensed with in certain cases.<sup>18</sup> Although in terms the statute referred only to forfeiture, the common law courts were quick to interpret it as providing for acquittal without any formal pardon.<sup>19</sup> Thus the equitable defense of self-defense, partly by statute and partly by the liberality of the courts of law, became a legal defense.<sup>20</sup>

When the necessity ceased for a formal pardon in cases clearly not within the statute is difficult to say. According to Stephen, statutes were passed on the subject, as late as the 19th century.<sup>21</sup> Perhaps the Statute of 9 Geo. 4, c.81 passed in 1828 marks the date, or perhaps through custom and usage the old law was forgotten in an earlier day.

It seems sufficient to say however in either event, that self-defense, while originally not an excuse for homicide, but merely a ground for pardon, became an excuse in equity, and was at last accepted at law. From these roots has sprung our modern law of self-defense.

JACK LOWERY, JR.

indicted, that he killed a man *se defendendo*, whereunto (for safeguard of his goods) he may plead not guilty; and if he be found guilty *se defendendo*, he forfeiteth his goods, if not guilty, he saveth them. Statute of Gloucester, 1278, 6 Edw. 1, c. 9; as quoted in COKE, SECOND INSTITUTE 316 (4th ed.).

<sup>14</sup> POLLOCK AND MAITLAND, *supra*, note 1, at 481.

<sup>15</sup> *Id.* Pollock and Maitland argue that during Henry III's reign, (1207-1272), forfeiture of goods was not inflicted and that the practice was one established later by needy kings. However that may be, it would appear that from the Statute of Gloucester in 1278 on, whatever had been the practice previously forfeiture was definitely established as an accompaniment to a pardon for homicide in self defense.

<sup>16</sup> Beale, *supra*, note 1 at 570.

<sup>17</sup> *Id.*

<sup>18</sup> The statute covered cases where one killed in protecting himself from robbery or murder, "in or nigh any common highway, or in their mansions."

<sup>19</sup> Coopers Case, Cro. Car. 544 as quoted by Beale, *supra*, note 1, at 571.

<sup>20</sup> Beale, *supra*, note 1 at 571.

<sup>21</sup> STEPHEN, 3 HISTORY OF THE CRIMINAL LAW OF ENGLAND 77. Here Stephen speaks of the statute of 9 GEO. 4, c. 31, which provides that neither punishment nor forfeiture shall be exacted where one kills another in self defense.