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PERFECT AND IMPERFECT SELF-DEFENSE—EFFECT OF FAULT OF DEFENDANT UPON RIGHT OF SELF-DEFENSE

The law gives to every man the right to protect himself against an unprovoked attack. Should death or grievous bodily harm be the probable result of this attack, this right extends even to taking the life of his assailant, if necessary.¹ The necessity for taking the life of the assailant, or for performing the act which results in his death, may be either real or apparent, so long as the one asserting the right acts in good faith with the reasonable belief that such necessity exists.

If the other elements of self-defense are present, but the attack has been provoked by some fault of the defendant, the courts are faced with the problem of determining the effect of this fault on the degree of the homicide. It is held that if the defendant provoked the attack for the purpose of obtaining an excuse to kill the other, he will not be permitted to go unpunished, but, since malice aforethought can clearly be shown in this situation, he will be convicted of murder.² Where one has provoked the attack by some

¹ The elements of self-defense are set out in WHARTON, HOMICIDE (3rd ed. 1907) sec. 223: "First, the slayer must have been reasonably without fault in bringing on the difficulty; second, he must believe at the time that he is in such immediate danger of losing his own life, or of receiving serious bodily harm, as renders it necessary to take the life of his assailant to save himself therefrom; third, the circumstances must have been such as to have warranted such a belief in the mind of a man of ordinary reason and firmness; and fourth, there must have been no other convenient or reasonable mode of escaping or retreating, or declining the combat."

² Williams v. State, 26 Ala. App. 529, 163 So. 668 (1935), People v. Orosco, 73 Cal. App. 580, 239 Pac. 82 (1925) State v. Jurko, 42 Idaho 319, 245 Pac. 685 (1926), People v. Priddy, 327 Ill. 50, 158 N.E. 457 (1927), Farley v. Commonwealth, 284 Ky. 536, 145 S.W. 2d 100 (1940), State v. Mosley, 213 N.C. 304, 195 S.E. 830 (1938) State v. Turner, 95 Utah 129, 79 P. 2d 46 (1938), Espy v. State, 54 Wyo. 291, 92 P. 2d 549 (1939).

"It is the apparent, not the real, necessity to kill in self-defense against death or great bodily harm which controls on the question of justification; in such cases, one has the right to act on the reasonable appearance of things." WHARTON, HOMICIDE (3rd ed. 1907) sec. 226.

"Belief in danger of fear of death or great bodily harm must have been actually entertained to justify a homicide, and the homicidal act must have been done under the controlling influence thereof; and the belief must have been well-founded and honest." *Id.* at sec. 228.

³ Pope v. State, 172 Ark. 61, 287 S.W. 747 (1926) McKee v. State, 198 Ind. 590, 154 N.E. 372 (1926), McCarty v. Commonwealth, 244 Ky. 413, 51 S.W. 2d 249 (1932) Akes v. States, 31 Okla. Cr. 386, 239 Pac. 187 (1925), Norwood v. State, 135 Tex. Cr. 406, 120 S.W. 2d 806 (1938), Scott v. Commonwealth, 143 Va. 510, 129 S.E. 360 (1925).

fault on his part, but without the intention of killing the other, the law is somewhat confused. In this situation: (a) some courts will hold him guilty of murder;⁴ (b) others, though denying him the right of self-defense, will consider the attack of the deceased as provocation which will reduce the homicide to manslaughter;⁵ (c) still other courts will hold him guilty of manslaughter by applying what is called the theory of imperfect self-defense.⁶ This last theory that of imperfect self-defense, is to be the subject considered in this note, together with the related subject, perfect self-defense.

The earliest case found in which the theory of imperfect self-defense is discussed is *Reed v. State*.⁷ In this case, the defendant was living in adultery with the wife of another. The estranged husband, breaking into the room where the adulterous couple were living, assaulted the defendant, who was forced to kill him in self-defense. The trial court ruled that the defendant had no right to resist the attack, since, by statute, a husband who found his wife in the act of adultery was justified in killing her paramour.⁸ On appeal, the conviction was reversed. The court stated that the trial court construed this statute too broadly in ruling that it not only gave the husband the right to kill the defendant, but also deprived the defendant of all right of self-defense against the husband, and "The accused is always guilty or innocent from his own stand-point, that is, his personal, individual acts with relation to the matter charged."⁹ However, the court was unwilling to hold that the homicide was entirely justified:

"A perfect right of self-defense can only obtain and prevail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon him—

⁴ *Madry v. State*, 201 Ala. 513, 78 So. 866 (1918)

"No matter how imminent the danger or pressing the necessity of the aggressor in the progress of the affray, if he himself has brought it in, or provoked it, he cannot kill and plead self-defense. And the situation is unaffected by the fact that he entered into the difficulty without intent to kill, and the other resorting to a deadly weapon before the killing." WHARTON, HOMICIDE (3rd ed. 1907) sec. 315.

⁵ *State v Hill*, 4 Dev & Batt. 629 (N.C. 1839)

⁶ *Akes v State*, 31 Okla. Cr. 386, 239 Pac. 187 (1925), *Nicks v. State*, 46 Tex. Crim. Rep. 241, 79 S.W. 35 (1904).

⁷ 11 Tex. Cr. App. 509 (1882).

⁸ TEX. PENAL CODE (Vernon, 1936) art. 1220.

⁹ *Reed v State*, 11 Tex. Cr. App. 509, 517 (1882).

self which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense."¹⁰

Having established the fact that the defendant will not be allowed the "perfect" right of self-defense, the court proceeded to determine the degree of his guilt. Since the defendant was committing a misdemeanor (adultery) which was the cause of and brought about the necessity for the homicide, the defendant was held guilty of manslaughter.

The rule of *Reed v. State* has been expanded into the more comprehensive rule of perfect and imperfect self-defense, as discussed in a subsequent case, *Franklin v. State*.¹¹ In this opinion, the court discussed three categories into which homicide cases involving a plea of self-defense can be placed, according to the degree of the defendant's fault in provoking the occasion which gave rise to the necessity for the homicide. The first category includes those cases in which the provoking act was done with felonious intent or for the purpose of killing or inflicting grievous bodily harm on the deceased. In cases falling within this category, the right of self-defense is denied, and the homicide is murder.¹² The second category includes those cases in which the provoking act was a misdemeanor, or was done for the purpose of committing a misdemeanor, or is an act well calculated to start a fight.¹³ In these cases, the right of self-defense is not denied, but is abridged, or, as it is usually expressed, it is imperfect. This homicide is manslaughter.¹⁴ The third category includes those cases in which there is neither an illegal act nor an act well calculated to start a fight. In such a case, the right of self-defense is perfect, and the homicide will be excused.¹⁵ The opinion of *Franklin v. State*, accordingly presents an analysis, prevailing in those states where the theory of imperfect self-defense is ac-

¹⁰ *Id.* at 517-518.

¹¹ 30 Tex. App. 638, 18 S.W. 468 (1892).

¹² *Coyle v. State*, 31 Tex. Crim. Rep. 604, 21 S.W. 765 (1893), *Gonzales v. State*, 30 Tex. App. 203, 16 S.W. 978 (1891).

¹³ Compare *Franklin v. State*, 30 Tex. App. 638, 18 S.W. 468 (1892), with *Barber v. State*, 87 Tex. Crim. Rep. 585, 223 S.W. 457 (1920), on the question of what are acts well calculated to start a fight. It appears that guilt or innocence from the defendant's viewpoint is one of the factors, if not the factor, which determines this question.

¹⁴ *Arto v. State*, 19 Tex. App. 126 (1885).

¹⁵ *Saens v. State*, 20 S.W. 737 (Tex. 1892), *Bonnard v. State*, 25 Tex. App. 173, 7 S.W. 862 (1888)

cepted, of the effect of the defendant's fault in provoking the attack which made the homicide necessary.¹⁶

While the theory of perfect and imperfect self-defense for determining the effect of the defendant's fault on his right of self-defense is not accepted in the majority of states, it will be seen that it represents no radical departure from the generally accepted law of homicide.¹⁷ In cases falling within category one, those in which the provoking act was done with felonious intent or for the purpose of killing or inflicting grievous bodily harm, the natural result is that the homicide is murder. Here, malice aforethought exists, either expressly, as evidenced by the defendant's intent to kill or inflict grievous bodily harm, or impliedly, in accordance with the felony murder rule.¹⁸ In cases falling within category two, where the provoking act was a misdemeanor, or was done for the purpose of committing a misdemeanor, or is an act well calculated to start a fight, no malice exists. However, the homicide, being the result of a misdemeanor, is wrongful. The expected result, that the homicide is manslaughter, is reached here. Category three,

¹⁶ Wallace v. United States, 162 U.S. 466, 16 S. Ct. 859, 40 L. Ed. 1039 (1896), Kinney v. People, 108 Ill. 519 (1884), State v. Painter, 329 Mo. 314, 44 S.W. 2d 79 (1931), Barber v. State, 87 Tex. Crim. Rep. 585, 223 S. W. 457 (1920) State v. Flory, 40 Wyo. 184, 276 Pac. 458 (1929).

¹⁷ Suggestions on this theory can be found in 4 BLACKSTONE, COMMENTARIES (11th ed. 1790) 187. "For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault; and if scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless."

¹⁸ It has been suggested that the rule, that any homicide which occurs in the course of a felony is murder, is not based on sound legal principles. See 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 57. It has also been suggested that the rule, that any homicide which occurs in the course of a misdemeanor is manslaughter, is not exactly true. A distinction is made between misdemeanors which are *malum in se*, which result in manslaughter, and those which are *malum prohibitum*, which do not; or between those misdemeanors which have a causal connection with the homicide, which results in manslaughter, and those with no causal connection, which do not have such a result. See Wilner, *Unintentional Homicide in the Commission of an Unlawful Act* (1939) 87 U. OF PA. L. REV. 811. But it cannot be doubted that a homicide which results in the course of a felony, which is itself so dangerous as to be a wanton act, is murder, in accordance with the rule of implied malice, or negligent murder. In the same way, if the misdemeanor is itself an act which is dangerous to human life, the homicide is manslaughter. Whether these limitations on the felony murder and misdemeanor manslaughter rules are accepted or not, the theory of this note is not affected, although the results of individual cases may differ.

containing cases in which the defendant is without fault and consequently has the perfect right of self-defense, should require no explanation or justification.

It is submitted that the foregoing analysis represents the most logical and reasonable approach to the problem which is taken by the courts today. It is superior to the strict rule, (a) *supra*, which denies anyone the right to self-defense if he is at fault, even though the fault is no more than a misdemeanor, since it avoids the extreme result of branding him as a murderer merely because he is guilty of some minor infraction of the law. While this extreme result is avoided by those courts, (b) *supra*, which will not accept the imperfect self-defense theory, but which will allow the defendant to plead provocation where it is not shown that he had the intent to kill or inflict grievous bodily harm on the deceased, nevertheless these courts take the illogical position of implying heat and passion in a case where the defendant's proof tends to establish self-defense. The legal concept of heat and passion and that of self-defense differ greatly. "Heat and passion" implies the partial loss of one's powers of reason, whereas "self-defense" denotes the full possession of one's reason, and the exercise of that reason in estimating the ferocity of the attack, its probable consequences, and the necessary measures for the defender to take to avert such consequences. The rule herein discussed is not open to these objections. Without resorting to any fiction, it affords an adequate method for punishing the person who seeks to conceal his malice behind the cloak of self-defense, but does not treat with undue harshness the person who, being slightly at fault, finds himself faced with the choice of killing or being killed.

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