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Criminal Procedure--Arrest--Use of Force in Making Arrest

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Before entering into any discussion of a problem, it is well that we stop a moment to discover, if we can, just what are the factual ramifications of the situations with which we have to deal. It is a well known maxim that republics are notoriously close with their public servants. We have entrusted the enforcement of our criminal laws to men who, in many instances, are poorly trained, poorly paid, and not high in the scale of intelligence. How far will we allow such men to go in enforcing their authority on the citizens of the state? What force will we allow them to use? It is quickly apparent that we cannot allow them to go too far, or the liberties of the populace will be jeopardized. On the other hand, the mores of society, the customs of the times, the law, if you please, must be brought to bear on anti-social individuals. All law is merely a balancing of interests. It will be our purpose in this paper to try to determine just how the jurists of our day have attempted to arrive at the proper balance between these two demands.

“No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than is necessary for his detention.” 1 This is a general statement which will perhaps be accepted by all who read it, but it is too broad to be of any practical use. Certainly use reasonable force, but just what is reasonable force? This is an important consideration. Let us examine a few cases. In Commonwealth v. Phelps, 2 the court held the following instruction correct: “What would be reasonable force on the part of a peace officer in proceeding to make an arrest depends upon the facts in each particular case. It is the duty of the jury to consider all of the circumstances shown by the evidence in passing judgment upon the question whether the peace officer used reasonable judgment in exerting the authority which the commonwealth contends was conferred on him by the law to make the arrest. The amount of force which may lawfully be used in effecting an arrest is no more than is actually necessary to

secure the arrest and safe custody of the accused.'

The case of \textit{Kreger v. Osborn} is also interesting. A writ authorizing an arrest was issued. Certain acts of violence were committed on the arrestee in making the arrest. The court said: "The writ was no justification of the violence alleged to have been committed on the arrestee in dragging him about and striking him. To justify these acts resistance to the officer was necessary." It would seem that such was not reasonable force under the circumstances. An excellent discussion of the problem may be found in the American State Reports. Part of the statement there is: "If the offender resists arrest, the officer may use such force as is reasonably necessary to overcome the resistance. But he cannot use violence when no resistance is offered, and, if he does so, he cannot excuse himself on the ground of a lawful right to make the arrest."

This much is reasonably clear. The difficulty arises when we seek to expand these maxims. However, before going into a more detailed discussion of the matter, it is well to note that the principal problem is inextricably intermingled with two others: (1) the right of the officer to arrest on suspicion in certain cases, and (2) the right of the officer to defend himself. These three must be carefully distinguished. Also it must be expressly noted throughout this paper that in all situations discussed, the officer has both the right and the duty to make the arrest.

An officer may not kill an arrestee to effect an arrest for a misdemeanor. He may use the necessary and reasonable force to effect this purpose. But what is necessary and reasonable force? This of course is largely a matter for the determination of the jury. But even so, large discretion must be left to the officer. He may be placed in a dangerous situation because of the duty placed upon him by the law to effect the arrest. Hairline distinctions and refined judgments cannot always be demanded of him. It should be enough if the force used appears necessary to the officer, if he has reasonable grounds for his belief. However, killing is never justifiable force to effect the arrest for a misdemeanor. "In our judgment, something of the

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\textsuperscript{3}See also note in \textit{61 Am. Dec.} 161.
\textsuperscript{4}7 Blackf. 74 (Ind. 1843).
\textsuperscript{5}3d Am. St. Rep. 966.
\textsuperscript{6}Gillespie v. State, 69 Ark. 573, 64 S. W. 947 (1901); Doolin v. Com., 95 Ky. 29, 23 S. W. 663 (1893).
same solicitous care for human life should be required of the officer making the arrest, and that it is better that the misdemeanor escape than the power to arrest be asserted to the extent of killing one whose offense only subjects him to a trifling fine or confinement for a few days in jail."

It has been said that the officer having the right to arrest an offender may use such force as is necessary to effect his purpose, even to the extent of taking life. In certain misdemeanor cases where the officer is resisted, the court may arrive at the right result by following this rule, but as a general statement of the law it is faulty. As has been said above, in all these cases, it is the duty of the officer to make the arrest. He is bound to become the aggressor to effect this purpose and should not grant the offender equal opportunities with him in the struggle. He may use such force as is necessary to overcome the resistance offered, short of taking life. If, in the struggle, he is put in danger of life or great bodily harm, he may kill his adversary. In the case of misdemeanors, this right arises not from his right to arrest but from his duty to arrest coupled with his right to defend himself. This distinction must be carefully noted. The confusion which may arise from a failure to do so is demonstrated by the case of Commonwealth v. Marcum where the court held that an officer having a right to arrest for a misdemeanor, if he is forcibly resisted may use such force as is necessary, or reasonably appears to the officer necessary, in the exercise of sound judgment, to overcome such force and make the arrest even to the extent of taking the life of the misdemeanant. This may reach the right result in many cases. However, it would seem impossible in many others, under this type of ruling, for a jury to keep separate the distinctions which we have mentioned above, and that they will be more lenient on the officer than sound reasoning and good law requires.

It is apparent that an officer may not kill a misdemeanant who is in flight to escape detention. The officer cannot possibly justify the homicide on the ground of self-defense; and, as has

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8 State v. Dunning, 177 N. C. 559, 98 S. E. 530 (1919).


10 135 Ky. 1, 122 S. W. 215 (1909).
been said above, the right to kill is not inherent in the right to arrest for a misdemeanor.\textsuperscript{11} If the arrest has been effected, and the offender breaks away and flees, the same rule must apply. This is true even after the offender has been convicted.\textsuperscript{12} "An officer may use force to prevent the escape of a prisoner whom he has arrested, but the degree of force or violence which he may use is not greater than such as may be rightfully employed to make the arrest."\textsuperscript{13}

In the case of felonies our basic considerations change to a large extent. The interest of society in bringing its offenders to justice is superior to the opposing interest of society in human life. Those who have transgressed against the social order to the extent that they are called felons, have forfeited to a great degree the right to call on society for its protection. This has been recognized since the day of the hue and cry in England. While the felon still has the right to demand that no unnecessary force shall be used against him, still our mores demand that the officer shall make the arrest whenever, wherever, and however he can. If necessary he may club the offender into insensibility; he may even kill him although no resistance is being offered if such measures are necessary to effect the arrest. "Here an officer may oppose force to force, and, if there be no other reasonably apparent method of effecting the arrest or preventing the escape of the felon, the officer may, if he has performed his duties in other respects, take the life of the offender. This rule not only applies to the felon himself, but also to those who are seeking to rescue the prisoner."\textsuperscript{14} The use of force by an officer should be carefully watched by the courts. The officer must be made to be most careful especially when no resistance is offered.

It is submitted that the foregoing represents the rule and the rationale as to the right of the officer to use force to effect the arrest of the felon. The question which we now have to consider is whether or not the application of these rules will arrive at substantial justice. Our fundamental consideration

\textsuperscript{11} Gray v. Earls, 298 Mo. 116, 250 S. W. 567 (1923).
\textsuperscript{12} Holloway v. Moser, 193 N. C. 185, 136 S. E. 375 (1927).
\textsuperscript{13} 2 R. C. L. 471.
\textsuperscript{14} Deemer, J., in State v. Smith, 127 Iowa 534, 103 N. W. 944 (1904). See also dictum in Head v. Martin, 85 Ky. 480, 3 S. W. 622 (1887), and in Johnson v. William's Admr., 111 Ky. 239, 63 S. W. 759 (1901); note also 61 Am. Dec. 162 et seq. (note).
when we discussed misdemeanors was that to allow the officer to take life to effect the arrest would be to put in his hands the power to inflict a punishment greatly disproportionate to the offense. Is such a rationale ever applicable to felonies? The answer must be unequivocally yes. Many offenses have been made felonies by statute which have no place in the category of heinous crimes. It is quite possible that the legislature hoped that, by including in the list of felonies such crimes as petit larceny, stealing a horse or a hog, or assault and battery, they had afforded a major deterrent to the commission of such offenses. But we cannot believe that they realized to what extent they had gone. No sane man could even attempt to justify the infliction of the death penalty on a negro who has stolen chickens, to value of two dollars or more, which theft is a felony under the Kentucky Statutes. Yet this is exactly the result if we allow the officer to shoot and kill such a one who is fleeing from arrest without offering any resistance, and from the strict application of the common law rule, as to the use of force in arresting such a homicide must be justified.

It is notorious that legislatures are slow to act. It is by judicial decision that a more humane and desirable rule can be achieved without resorting to the expedient of political logrolling. Indeed, though a generally accepted modification of the common law rule has not yet been evolved, we see glimmerings of light. The dissatisfaction which has been felt with the old rule is well brought out in the case of . The Irish court holds here that, while a gamekeeper may lawfully arrest for a felony committed in his presence without a warrant, he may not fire on the offender for that would perhaps be punishing with death an offense for which the law provides a minor punishment. The essential good sense behind such a holding has been recognized in this country. In a military prisoner was shot while trying to escape. The Court justified the homicide on the ground that the prisoner was in the army. However, they intimated that, if the offense had been civil instead of military, a different result would have been reached, saying: “Suppose a person were arrested for petit

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34 If. Stat., Sec. 1201c.
35 1 Crawf. & D. 20 (1839).
36 31 Fed. 710, 713 (1887).
larceny, which is a felony at the common law. Might an officer under any circumstances be justified in killing him to effect his arrest? I think not. The punishment is altogether too disproportionate to the offense." The same rule is found applied to arrests by private persons in the case of State v. Bryant.17 There the court held that a private person may not kill to arrest for a felony of inferior grade, such as theft, if the felon does not resist, but only attempts to escape by flight. The court limits the right to kill to arrest to capital offenses, such as murder and rape. It is unfortunate that the court here limited its decision to private persons.

Difficulties present themselves. At just what point in the list of felonies are we going to give the officer the right to kill to effect the arrest? This is an important problem and one not easy of solution. The view taken in Storey v. State18 is to the effect that the rule does not authorize the killing of persons attempting secret felonies not accompanied by force. It is difficult to understand just why the felony must be secret in order that the killing be not justified. We find another attempted point of division in the case of State v. Bryant19 between inferior and capital felonies. This is of no help; it is too indefinite. We must here as always seek to determine our basic principles. Human life is again balanced against the interest of society in having its offenders brought to the bar of justice. What interest will be superior to the given case depends on many factors. The apprehension which the crime tends to excite, the degree of moral turpitude involved, the punishment which is to be meted out, the injury to person or property which may result from a recurrence of the same act, the amount of force which has been used in the commission of the crime, the presence or absence of malice, all must be considered. An all comprehensive rule cannot be given. Whether or not a given offense shall be considered of inferior grade must be determined in the light of the factors given above. Specific cases must arise before any comprehensive list can be worked out. Eventually a category of this kind can be developed. In the meantime, some well meaning officers will suffer because they have inflicted death to arrest for a crime

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17 65 N. C. 327 (1871).
18 71 Ala. 329 (1882).
19 Supra, note 17.
which the courts come to decide is only a minor felony after the felon has been killed. Be this as it may, the few must suffer as always that substantial justice for the many may be obtained.

The problem which next arises is whether an officer may justify a homicide which he commits in an effort to arrest or prevent the escape of one who is reasonably suspected of having committed a felony but who has not done so. The better rule apparently is that the homicide is not justifiable unless for the reasons given in our discussion on misdemeanors. This rule would seem to be open to question. The officer is entitled to make the arrest in such a situation. Why not argue that, if he has the right to make the arrest, he should be given all the privileges which ordinarily go with such a right? On the other hand, there is the interest of society in the life of its members. We cannot, and should not, make a seventy-dollar-a-month officer a judge of life or death. The rule as we have stated it is borne out in the decided cases. The court in Petrie v. Cartwright states: “We have been unable to find any common law authority justifying an officer in killing a person sought to be arrested, who had fled from him, where the officer acted upon suspicion, and no felony had in fact been committed.” That the law forces the officer to act at his peril here is one of the burdens incident on his office.

In summary we may lay down the following rules. (1) An officer may in all cases use any force reasonably necessary to effect the arrest. (2) The jury, in the end, must be the arbiter of the force necessary, but large discretion must necessarily be left in the officer. (3) Killing is never reasonable force to effect the arrest of a misdemeanant, although a right to kill may arise from the officer’s duty to make the arrest coupled with his right to defend himself. (4) An officer may kill to effect the arrest of a felon, but he should be most careful in exercising this right, especially when no resistance is offered. (5) Although not generally accepted, a better rule would be to limit the right to kill to arrest for capital offenses, and deprive the officer of this right when he seeks to arrest for an inferior felony. (6) Whether a

114 Ky. 103, 70 S. W. 297 (1902).

21 Johnson v. William’s Admr., 111 Ky. 289, 63 S. W. 759, 17 Ann. Cas. 900 (1901); 2 R. C. L. 472.
given felony will be considered capital or inferior, must be determined in each particular case, and no general line of demarcation can be found. (7) The officer acts at his peril in using force, and, if he kills one who is suspected of committing a felony but who is not guilty or who has only committed a misdemeanor, such homicide is not justifiable.

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