1932

Crimes--Duty to Retreat "to the Wall"

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Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol20/iss3/12

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agencies of the government from making legal searches and seizures that are unreasonable. It seems as tho this must necessarily be the extent of the immunity. People v. Mayen, 205 Pac. 435, p. 441. By the federal exclusion rule a double immunity is given the people. One against the legalization of a trespass, and the other affecting a rule of evidence. There is no provision that after the trespass is committed the evidence obtained in the course of the illegal act shall not be admitted. 19 Ill. Law Review 307. It might be urged that the admission of the evidence condones the method of obtaining it. But how can we sustain this argument in the face of the fact that the same court will subsequently prosecute the officer for the illegal act and will not recognize as a defense that the evidence was admitted in a prior trial. The trespass is complete when the property is seized. The government is not committing an illegal act. The individual is the offender. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." McGuire v. United States, 273 U. S. 95, 99 (1927).

Finally, there is the fact that the federal exclusion rule violates a rule of evidence, in permitting improper grounds for objections. State v. Fahm, 53 N. D. 203, 205 N. W. 67, 69 (1925). This is not denied by the courts that support the exclusion rule, and is affirmed by all the great authorities on evidence. Wigmore on Evidence, sec. 2183, and Greenleaf on Evidence, sec. 254a. It would appear then that the courts would entertain some hesitancy in openly violating the rules of procedure laid down for them both by the common law and by their codes.

In light of the procedure in the federal courts and in those state courts that adopt the exclusion rule, is it not strange that the great mass of laymen wonder at the total inadequacy of the American legal system to cope with the present day prevalence of crime? It may be that the constitutional guarantees discussed in this paper have yielded benefits that were not deserved. "Neither of the amendments had a genesis that can be said to have been prophetic of the great repute they have come to enjoy. My impression is, that so many have been the criminals who have worshipped at the shrine of the amendments, and so seldom have honest and law-abiding men had occasion to seek their protection, that their adulation by the law-breaker has given the people at large a false conception of their proper breadth and compass." Jno. C. Knott, 74 Pa. Law Review 141.

We must be cautious in granting a creature powers that will enable it to be a thorn in the side of its creator, and vigilant to forestall a protector against wielding a sword that wounds its master.

JAS. T. HATCHER.

CRIMES—DUTY TO RETREAT "TO THE WALL".—In the Kentucky case of Gibson v. Commonwealth, A was killed in a drunken brawl. B and C along with D were convicted of manslaughter. The decision of the

1 34 S. W. 926 (1931).
lower court requires no statement of facts except that B and C claimed that B shot A in self-defense. The problem of the case rests in the lower court's instructions which said that the defendant must flee from danger before the plea of self-defense was available.

The upper court held that one in a place of right need not retreat but might defend himself when attacked by another with a deadly weapon.2

In a discussion of this problem the following two situations are of importance: first, where the person assailed is not on his own premises; secondly, where the assailed is on his own premises, i.e., within the curtilage.

In regard to the first situation the orthodox rule in America is that when a person is attacked with a dangerous weapon he must retreat as far as he can, or, according to the common law doctrine, he must retreat "to the wall" before the right of killing the other is available to him.3 By this rule there is no necessity for killing as long as there is an avenue of escape.4

The rule is best expressed in the words of a Delaware court.5 The court said: "The assailed must retreat from his assailant as far as he can and never until he has done this unavailingy can he meet his opponent and slay him. This is illustrated by the familiar instance given of two men in a room and one assailing another to take his life or inflict great bodily injury as mentioned. In such a case, the assailed must retreat as far as he can—he be driven 'to the wall' as we say figuratively, before the final remedy for protection is accorded him. If life or person can be protected in any other way than by taking life it must be done or the homicidal act will be treated in law as a malicious or murderous one."

There is one exception to the common law doctrine: namely, if the assault upon a person is so great that the assaulted cannot retreat because of manifest danger of death or great bodily harm, he may kill his assailant. His act must be one of necessity.6

In a New York case7 the court said: "A person attacked is not bound to retreat if such would imperil his safety the more, or if a reasonable man under the circumstances would be justified in believing

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2 In reviewing this problem a difference should be noted between a simple assault and a murderous attack. In the first instance the person attacked may stand his ground and meet force with force, because such resistance is not apt to lead to serious bodily harm.

   State v. Blevis, 138 N. C. 668, 50 S. E. 763 (1904). As to simple assault see 5 Wis. Law Review 500.


4 State v. Lee, 92 Ala. 15, 9 So. 407 (1891); State v. Don, 27 N. W. 369 (1886).


6 Com. v. Drum (1868), 58 Penn. 9.

that to retreat would add to the danger." It is necessary that the defendant actually believe that he was in danger, and if he retreated it would add to the danger. It is not enough to show there were reasonable grounds for the belief. The bona fide existence of the belief must be proved.

Whether a person should retreat depends upon: (1) the suddenness of the attack; (2) imminence of the danger; (3) violence of the attack; (4) age and strength of the parties.

The common law rule made the duty to retreat from a felonious attack on the one hand and standing one's ground and meeting force with force on the other, to depend upon whether or not the case was one of excusable self-defense. Where there was no collateral felony and it was felonious only because it involved an intent to kill or seriously injure the person assaulted, it was a case of excusable self-defense. The person assaulted was required to retreat "to the wall" before being warranted in killing to defend himself. However, where there was a collateral felony, other than the assault, as for example an intent to rob, or the person was in the performance of an official duty, it was a case of justifiable self-defense, in which case it was the duty and right of the person to stand his ground and meet force with force.

In a few jurisdictions the common law doctrine has been supplanted by the "non-retreat" rule. If the person is in a place where he has a right to be and is without fault and he is put in reasonably apparent danger of losing his life or receiving great bodily harm, he need not retreat. He may stand his ground and repel force with force, even taking the life of his assailant if necessary. This view is sometimes called the "Texas Rule" and is found expressed in the Texas Statutes.

In an Oklahoma case, it was held improper to instruct the jury that if the accused could have avoided that danger and the killing by retreating it was his duty to do so, for the reason that when a person is unlawfully attacked in a place where he has a right to be, he may stand his ground and defend himself.

In Kentucky the law is settled that under conditions filled with risk of death or great bodily harm the person attacked need not retreat at all in order to avail himself of the full right of self-defense.

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8 Trogden v. State (1892), 133 Ind. 1, 32 N. E. 725; State v. Smith (1892), 114 Mo. 406, 21 S. W. 827; Howard v. State (1896), 110 Ala. 92, 20 So. 365.
9 Trogden v. State (1892), 133 Ind. 1.
10 People v. Garretson (N. Y.), 2 Wheeler Criminal Cases 347 (1825).
11 Ball v. State (1890), 14 S. W. 1012; People v. Batcholder (1864), 27 Cal. 69; People v. Huker (1895), 109 Cal. 451.
12 1 Vernon's Criminal Statutes 1914, Art. 1108.
14 See also Hammond v. People (1902), 54 Washington 210, 100 Pac. 309.
15 Daugherty v. Com. (1914), 157 Ky. 348, 163 S. W. 453; Conner v. Com. (1904), 118 Ky. 497.
One may, in Kentucky, act upon reasonable fear of immediate danger though the deceased made no hostile demonstration. The extreme view of the Kentucky court may be seen in a quotation from one opinion. The court said: "It is sufficient for this case to decide that if the appellant had reason to apprehend that Miller would shoot him unless he could shoot Miller first or run away, the law does not require him to run and be shot in the back or be secretly assassinated but justifies his taking of Miller's life and if he believed that Miller had no pistol but was maneuvering to make him run, can not make him culpable for doing what he had a good reason to believe was necessary for either the immediate or ultimate security of his life and if the party once assailed by an enemy who had threatened to kill him is bound by law to run if he can thereby escape that assailant, legal self-defense may become a mockery and the sacred right itself a mockery and a shadow. Like the sword of Damocles the danger is continually impending everywhere. The threatened man may be waylaid or otherwise attacked without the possibility of defense."

The federal courts seem to be divided upon the question. In some of the decisions the "non retreat" rule has been followed. The Rowe case was decided in November, while in December of the same year in Allen v. U. S. the court said that the assailed was bound to retreat.

In another federal case, the court held the defendant was bound to retreat. On the other hand the Rowe case said that the defendant was where he had a right to be and the law did not require him to step aside when his assailant was rapidly advancing with a deadly weapon, and under the circumstances it was an error to make the case depend in whole or in part upon the inquiry whether the accused could by stepping aside have avoided the danger.

In regard to the second situation, it is the universal rule that one on his own premises need not retreat. This rule comes to us from the feudal days when a man's home was his castle.

Some courts have extended the rule to a person's place of business. Others have extended the rule to a person's club rooms. As to a person attacked while in pursuit of an illegal business one court said: "the illegality of a business does not abrogate the owner's right in respect to self-defense, and if a man's place of business is as much

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**Notes:**

3. 164 U. S. 546.
4. 164 U. S. 492.
6. Jones v. State (1884), 76 Ala. 8; People v. Lewis (1897), 117 Cal. 186.
his 'castle' as his dwelling house, he has, as against private persons, a legal right there whether or not the business is unlawful." In another case, the defendant conducted a bawdy house and the court said that the house was his castle.

It has been mentioned that it is logical for the same rule to apply to business houses as to the dwelling houses. The same reasons apply to both. These observations are debatable. In the first place, the traditional "castle doctrine" as relating to a person's home would hardly apply to his workshop. Secondly, man's domestic duty to protect his family would not apply to his business house where he alone is present. Thirdly, because a person is in his counting house does not necessitate his standing ground and causing the destruction of his own or his assailant's life.

Wharton says that a person in his own house may stand his ground and is not bound to retreat, but if he is in another's home it is his duty to escape, and he is not excused for taking his assailant's life if there is an avenue of escape.

The conclusions of the courts denying the "duty to retreat" rule are based upon four grounds: 1. Rights of an individual cannot be yielded to a wrongdoer. 2. It is a disgrace to retreat and throw "honor" to the winds. 3. With the coming of firearms the rule is unworkable. 4. Prevents the assailed from being protected from subsequent assaults.

The "honor" theory is meaningless and beyond the law. The law only allows one to protect his rights in accordance with the interests of the state whose interests do not justify crime.

The days of the southwest cattle wars, saloon brawls and Kentucky feuds are over. People who formerly went beyond the pale of law for justice are discovering that the law gives them redress for violation of their persons. An honorable and brave man may retreat and regret it, but if he stands his ground and kills another there is greater chance for regret.

In regard to the prevailing rule as applied to one's dwelling, it is an inheritance from the turbulent times when a retreat from the castle meant an increase of peril and danger. Such a rule today is unnecessary.

Blackstone summed up the true doctrine when he said: "and though it may be cowardice in time of war between two independent nations to flee from an enemy, yet as between two fellow subjects the law countenances no such point of honor." However, it seems that the tendency of the American courts is towards the establishment of the "non retreat" rule.

CLARENCE ROTHENBURG.

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28 People v. Rector, N. Y. (1838), 19 Wend. 569.
27 12 In. L. Rev. 172.
23 Wharton's Crim. Law, 3rd Ed. (1907), p. 481.
29 4 Bl. Com. 185.