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Volume 64 | Issue 3

Article 9

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April 1962

# Criminal Law--Defense of Others

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## Recommended Citation

Charles H. Rudolph Jr., *Criminal Law--Defense of Others*, 64 W. Va. L. Rev. (1962).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol64/iss3/9>

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court," and the court accordingly held that the unrestricted right to appeal does not guarantee due process.

The concurring opinion by Judge Calhoun in the principal case presents two additional grounds, not argued in the case, upon which the legislative enactment in question might have been held unconstitutional. W. VA. CONST. art. XII, § 5, provides in part: "The legislature shall provide for the support of free schools by appropriating thereto . . . the net process of all forfeitures and fines accruing to this State under the laws thereof." The statute in the principal case provided that fines assessed shall be remitted to a designated account, and the balance, if any, after paying specified expenses, "shall become a part of the regular county general fund." This completely diverts fines from the school system. In *State v. Parkins*, 63 W. Va. 385, 61 S.E. 337 (1908), a statute providing that game wardens should receive as compensation all fines assessed by them was held to be in violation of article XII, section 5 of the West Virginia Constitution. The act in the present case further provided, in section 5, that "the judge of any court of record exercising appellate jurisdiction from a justice court . . . may, in absence, sickness, or inability of a justice to act, appoint a special justice to sit during the absence." W. VA. CONST. art. VIII, § 30, provides in part: "Vacancies in the office of . . . justices of the peace, shall be filled by the county court of the county until the next election." The case of *State ex rel. Neal v. Barron*, 120 S.E.2d 702 (W. Va. 1961), held the quoted provisions of the Constitution as mandatory, and that vacancies were not to be filled in any manner other than by the county court. The concurring opinion in the principal case should be closely noted by those who anticipate future drafting of legislation in this area.

*John Everett Busch*

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### Criminal Law—Defense of Others

Upon hearing cries for help, *D* discovered two men choking and kicking a third man who was lying on the ground. *D* fired four shots with his rifle wounding both assailants. At the trial, the jury was instructed that ". . . before one person has the right to use force in the defense or aid of another, the circumstances must be such that the person on whom the assault is being made has the right of self-defense." The jury found *D* guilty of atrocious assault

and battery with a dangerous weapon, and he appealed. *Held*, reversed and remanded. *D* should have been acquitted if his conduct was justified upon the facts as he reasonably concluded them to be, both in relation to the gravity of the threat, and to the extent of the force necessary, and not on the basis of the apparent victim's right of self-defense. *State v. Chiarello*, 174 A.2d 506 (N.J. Super. 1961).

The principal case presents an interesting problem over which the courts are in discord. The conflict is between those advocating the "alter ego" rule as espoused by the trial court, and those advocating the reasonable mistake of fact doctrine upon which the New Jersey Superior Court rests its decision. This conflict is difficult enough, but it gains complexity when the common-law right to prevent the commission of a felony is considered in conjunction with, or as an alternative to, the common-law right to use force in the defense of others.

Perkins states that the proper view of the common law is that the "alter ego" rule is only correct when all the facts are known to the defender, but when the defender acts in good faith and in ignorance of the other's fault, then such a defender is justified if he is acting on reasonable appearances. PERKINS, CRIMINAL LAW 910, 11 (1957). Although there is case law in conflict with Perkins' position, most writers and some cases bring forth similar views. *Frew v. Teagarden*, 111 Kan. 107, 205 Pac. 1023 (1922); *White v. Commonwealth*, 333 S.W.2d 521 (Ky. 1960); *State v. Wiseman*, 94 W. Va. 224, 118 S.E. 139 (1939); 2 BURDICK, LAW OF CRIME § 437 (1946); 6 C.J.S. *Assault and Battery* § 93 (1937).

One rationale suggested by the proponents of the reasonable mistake of fact doctrine is that one who defends in good faith and under a reasonable mistake of facts can not be guilty of a crime because he lacks the requisite intent. MODEL PENAL CODE § 3.05 (1), comment (Tent. Draft No. 8, 1958). The proponents of the "alter ego" rule, in turn, contend that adhering to the reasonable mistake of fact doctrine would sometimes result in injury or death to innocent persons without criminal liability. Although the policy of the law is undoubtedly adverse to permitting injury or death without criminal liability when such liability is present, it would also appear that there is a counter-balancing policy which encourages the protection of innocent men who are attacked.

The common law recognizes the privilege to use force to prevent the commission of a felony or of a misdemeanor which amounts to a breach of the peace, but deadly force may only be used when it appears reasonably necessary to prevent a dangerous felony. PERKINS, CRIMINAL LAW 881 (1957). The established rule is that the reasonable mistake of fact doctrine applies to the right to use force to prevent the commission of felonies and misdemeanors which amount to a breach of the peace. *Spicer v. People*, 11 Ill. App. 294 (1882); 2 BURDICK, LAW OF CRIME § 437 (1946); PERKINS, CRIMINAL LAW 910 (1957). It is obvious that situations could arise wherein both the right to use force in the defense of others and the right to use force to prevent the commission of a felony would be available to the intervener as defenses. In that case, the supporters of the "alter ego" rule would be in the anomalous position of denying the reasonable mistake of fact doctrine if the former defense were used, yet upholding it if the latter defense were interposed.

Another inconsistent position often taken with regard to the right to use force in the defense of others concerns what persons an intervener may defend. "Although Lord Hale and others appear sometimes to intimate a distinction in these respects between the cases of servants and friends and that of a mere stranger, yet it must be confessed that the limits of both are nowhere accurately defined." 2 BURDICK, LAW OF CRIME § 437 (1946). Burdick's statement may no longer be entirely accurate because many jurisdictions have enacted legislation specifically stating the relationship necessary between the intervener and the person allegedly assaulted before the intervener may successfully interject his defense of that individual. There is a significant lack of uniformity among these statutes. See the compilation in MODEL PENAL CODE app. A (14) (Tent. Draft No. 8, 1958).

However, the wide variety of relationships required by the statutes and the lack of clarity on this point where no statute is in effect has little practical significance in the typical case. For, in most instances where the defense of others might be invoked, the complementary defense of the right to use force to prevent a felony is also available. The latter defense does not require any relationship between the apparent victim and the intervener. Therefore, by discarding the defense of others and interposing the defense of the use of force to prevent a felony, the intervener circumvents both the

artificial distinctions made by the statutes and the uncertainty attributable to the common law on this point, and thereby makes discussion of these distinctions largely an academic matter. The reasoning which supports the maintenance of these special relationships seems obscure. But the rule, vague as it may be, still exists. 40 C.J.S. *Homocide* § 108 (1944). However, this requirement has seemingly been abandoned in England where its uncertain roots lie. MODEL PENAL CODE § 3.05, comment (Tent. Draft No. 8, 1958). In the United States, statements can be found to the effect that strangers may be defended. *State v. Greer*, 22 W. Va. 800, 819 (1883). But the *Greer* case involved brothers, consequently the statement about strangers is dictum as are many similar statements in cases in this area.

The logical solution to this problem would appear to be the one adopted by the MODEL PENAL CODE § 3.05 (Tent. Draft No. 8, 1958). This solution grants the intervener the right to use such force in the defense of others, including strangers, as he could use in his own defense with the provision that the reasonable mistake of fact doctrine will apply both in regard to the amount of force necessary and in regard to the fault, or lack thereof, of the apparent victim who is being defended.

*Charles Henry Rudolph, Jr.*

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#### **Criminal Law—Former Jeopardy—Indictment for Conspiracy to Murder**

*D* was indicted for the murder of *X* and upon the trial of that offense the jury was unable to agree and was discharged. Subsequently, a joint indictment was returned against *D* and four other persons charging them with conspiracy to murder *X*, and also charging the murder of *X*. Upon the separate trial of *D* on the indictment for conspiracy the jury returned a verdict of not guilty. *D* was discharged in that proceeding and the circuit court fixed a date for the second trial of *D* upon the original indictment for murder. *D* filed a plea of former jeopardy and prayed that he be released and discharged from the charge of murder in the first indictment. The circuit court held *D*'s plea of former jeopardy to be insufficient in law and *D* asked for a writ of prohibition from the West Virginia Supreme Court to prevent him from being twice put in jeopardy of life or liberty for the same offense. *Held*, writ