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Criminal Law--The Use of Force in Defense of Property

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best rule. There are, however, two situations in which a minority rule is sounder. A private person should, contrary to the majority rule, be able to make an arrest for a felony upon reasonable belief that one has been committed. Further a private person should not be allowed to arrest for a misdemeanor committed in his presence not amounting to a breach of the peace. It is contended that public interest is great enough in the first situation to warrant arrest by a private person, while in the second situation these lesser offenses are not a serious enough threat to the public to afford the right of arrest by a private person.

The result reached by accepting the majority view with these two exceptions could be codified briefly as follows:

A police officer may arrest without a warrant:

- (1) for a felony committed in his presence;
- (2) upon reasonable belief that a felony has been committed and reasonable belief that the person arrested committed it;
- (3) to prevent the commission of a felony;
- (4) for a misdemeanor committed in his presence.

A private person may arrest without a warrant:

- (1) for a felony committed in his presence;
- (2) upon reasonable belief that a felony has been committed and reasonable belief that the person arrested committed it;
- (3) to prevent the commission of a felony;
- (4) for any misdemeanor amounting to a breach of the peace committed in his presence.

NORMA D. BOSTER

CRIMINAL LAW—THE USE OF FORCE IN DEFENSE OF PROPERTY

In most civilized countries, the right to acquire and own property is recognized by law. Therefore, it would seem reasonable to assume that in connection with the right to own, a property owner should have a right to defend his property against an aggressor. Nevertheless, it is axiomatic that the law places a higher value on life than on property. Consequently there exists a basic principle that one is not privileged to kill in order to protect property.¹ However, certain ex-

¹ Russell v. State, 219 Ala. 567, 122 So. 683 (1929); 1 BISHOP, CRIMINAL LAW 610 (9th ed. 1923); MAY, CRIMINAL LAW 76 (4th ed. 1938); 26 AM. JUR. 272 (1940); 40 C. J. S. 977 (1944).

ceptions to this principle are recognized by the courts. The purpose of this note is to appraise the validity of these exceptions and to show to what extent force may be used by a person in defending his property.

Killing to prevent the commission of a felony is the main exception stated by the courts. According to the cases, homicide in defense of property is justifiable when committed in the prevention of a felony accompanied with "violence or surprise."² The felonies usually enumerated are murder, rape, sodomy, burglary, arson, and robbery.³ In considering each felony and its elements, it is clear that the first three listed felonies are strictly against the person. Although they might occur in connection with defense of property, the real basis for justifying the use of force is self-defense which is a branch of the law separate from that which applies to defense of property. The latter three felonies, namely burglary, arson, and robbery, are generally considered crimes against property. These will be examined in order.

First, burglary at common law is the breaking and entering of another's dwelling house in the nighttime with the intent to commit a felony therein.⁴ The breaking may be actual or constructive.⁵ If there is neither force nor fraud there is no burglary.⁶ The term "dwelling house" means a building which is actually occupied as such, although it may also be occupied for other purposes; and it includes the entire cluster of buildings, not separated by a public way, which are used for purposes connected with habitation.⁷ However, the law punishes burglary primarily, not because of the injury to the dwelling house, but because of the potential danger to human life inherent in the offense.

Similarly the second felony, arson, at common law is the malicious burning of another's dwelling house.⁸ It is an offense against the security afforded by a man's dwelling house, and the law looks upon it in this light rather than as an injury to his property.⁹ Arson presents the question of defense of habitation, as did burglary.

² *Storey v. State*, 71 Ala. 329 (1882); *Brown v. State*, 149 Ark. 588, 233 S.W. 762 (1921); *Shafer v. State*, 191 Ga. 722, 13 S.E. 2d 798 (1941); *Commonwealth v. Beverly*, 237 Ky. 35, 34 S.W. 2d 941 (1931).

³ See cases cited *supra* note 2.

⁴ 2 BISHOP, CRIMINAL LAW 69 (9th ed. 1923); MAY, CRIMINAL LAW 307 (4th ed. 1938).

⁵ MAY, CRIMINAL LAW 307 (4th ed. 1938).

⁶ 2 BISHOP, CRIMINAL LAW 72 (9th ed. 1923); MAY, CRIMINAL LAW 307 (4th ed. 1938).

⁷ 2 BISHOP, CRIMINAL LAW 307 (9th ed. 1923); MAY, CRIMINAL LAW 80 (4th ed. 1938).

⁸ BISHOP, CRIMINAL LAW 6 (9th ed. 1923); MAY, CRIMINAL LAW 302 (4th ed. 1938).

⁹ MAY, CRIMINAL LAW 302 (4th ed. 1938).

Third, robbery is larceny from the person or his personal presence by force or violence or by putting him in fear.¹⁰ It seems that this felony injects the question of danger to human life and also self-defense and certain other defenses against potential personal violence. Thus it is found that all the felonies included in the rule involve potential violence to the person.

Larceny, which can be either a felony or a misdemeanor, is the only other felony which merits discussion. Larceny is commonly defined to be felonious taking and carrying away of the personal property of another.¹¹ Larceny is a felony which does not involve self-defense or defense of habitation. Since larceny is a secret crime not attended with force or violence, it does not warrant the killing of a person to prevent its consummation.¹² So larceny is taken out of the exception in modern decisions.

The felonies which have been discussed are the general common law felonies involved in defense of property. These do not include all the crimes which have been made felonies by statute. The fact that these statutory felonies include such a wide scope of offenses only adds to the confusion of the formerly stated general principles as to killing to prevent a felony.

Another so-called exception that is stated by the courts in homicide cases is that assault or assault and battery might be justifiable in defense of property¹³ although homicide is not. In a Pennsylvania case decided in 1945,¹⁴ the defendant was indicted and convicted of aggravated assault and battery. In his defense he replied upon his right as a property owner to defend his property. The defendant had purchased an automobile which was financed and had failed to meet the installments. The finance company's representatives came to defendant's apartment at eleven o'clock, rang the bell, and received no response. The defendant's car was at this time parked in the driveway. The automobile was pushed out onto the main street, and the hood was raised to check the serial numbers. The defendant, believing that the men were stealing her car, fired two shots to frighten them, not intending to hit either. Thus the issue presented to the court was: Where in good faith, and upon reasonable grounds, one believes his automobile in being stolen, from where it is parked in broad daylight

¹⁰ 2 BISHOP, CRIMINAL LAW 860 (9th ed. 1923); MAY, CRIMINAL LAW 296 (4th ed. 1938).

¹¹ MAY, CRIMINAL LAW 318 (4th ed. 1938).

¹² Commonwealth v. Beverly, 237 Ky. 35, 34 S.W. 2d 941 (1931); State v. Plumlee, 177 La. 687, 149 So. 425 (1933).

¹³ State v. McLeod, 82 Ohio App. 155, 80 N.E. 2d 699 (1949).

¹⁴ Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A. 2d 568 (1945).

on an unopened street, may he shoot the person believed to be the thief in order to prevent the supposed larceny? The court answered this question in the negative, basing its reasoning on the already well established rule discussed above, that homicide is not justifiable in the defense of property. In discussing the right to kill to prevent the commission of a felony, the court pointed out that this right does not extend to the prevention of *all* felonies. They further stated that killing may be justifiable only in the cases of an *atrocious or forceful crime*. The court then came to their conclusion by a process of elimination, and held that the defendant was not defending her person nor her home; that there was no felony by force nor any atrocious crime to be prevented; that there was no danger to her habitation; therefore there was no justification in law for the infliction of bodily harm.

Having narrowed the rule to this extent, the problem is the determination of the amount of force which may actually be used in cases not coming within the recognized exception. In solving this problem, the courts repeatedly say that "one may lawfully use that amount of force which is necessary under the circumstances."¹⁵ It may be readily seen that this statement may be very dangerous in its application. A more conservative and more accurate statement is that the force used should be such as a reasonable person would have used under the circumstances.¹⁶

Realistically speaking, the existing law may be summarized as follows: In cases of trespass to real property, there is a requirement that the trespasser be first requested to leave the property before *any* action is taken against him.¹⁷ If this has been done and the trespasser has refused to leave, then the owner may use such force as is reasonably necessary under the circumstances,¹⁸ but may not use a deadly weapon except in extreme cases.¹⁹ In those cases, self-defense becomes a factor.

As to chattels, the courts have no definition for either "necessary" or "force". They make no reference to whether "necessary" force is that which is required to prevent a crime or whether it is that which is necessary to get the property back. Whether the force used is neces-

¹⁵ Russell v. State, 219 Ala. 567, 122 So. 683 (1929); State v. Terrell, 55 Utah 314, 186 P. 108 (1919); 1 BISHOP, CRIMINAL LAW 612 (9th ed. 1923).

¹⁶ State v. Cessna, 170 Iowa 726, 153 N.W. 194 (1915); Stacey v. Commonwealth, 189 Ky. 402, 225 S.W. 37, (1920); Garner v. State, — Miss. —, 2 So. 2d 828 (1941).

¹⁷ Fore v. Commonwealth, 291 Ky. 34, 163 S.W. 48 (1942).

¹⁸ Peasley v. Puget Sound Tug & Barge Co., 13 Wash. 2d 485, 125 P. 2d 681 (1942); State v. Flanagan, 76 W.Va. 783, 86 S.E. 890 (1915).

¹⁹ State v. Schloredt, 57 Wyo. 1, 111 P. 2d 128 (1941).

sary is said to be largely a question for the jury.²⁰ Here the rule is very confusing. Force amounting to killing or seriously wounding the tortfeasor should not be permitted and this is believed to be the law.

In conclusion it may be said that the law as to the right to defend property, although seemingly well settled, is in reality somewhat in confusion. As has been previously stated, the courts seldom base their decisions on defense and protection of property alone. It is believed that reliance solely upon protection of property as a defense in a criminal or civil case is impossible as a matter of law, except under situations coming within the recognized exceptions.

ANNE H. WOODS

CREDITORS' RIGHTS—JUDGMENT LIENS AND PRIORITIES IN KENTUCKY

An important problem relating to rights of creditors is to determine when a judgment creditor acquires a lien on the property of a judgment debtor and the effect of such acquisition. Especially perplexing is determining the priorities of liens between the judgment creditor and other creditors and purchasers. An effort will be made to formulate from Kentucky statutes and decisions the correct procedure to be followed by the judgment creditor who desires to secure his judgment by obtaining and perfecting a lien on the debtor's property. The reader is advised, however, that the information gathered from the statutes and cases may be supplemented beneficially by an examination of lower court records in particular communities, because relatively few cases pertaining to this subject have reached the Court of Appeals.

There are divergent views in different jurisdictions as to the exact time when a lien on property of the debtor is created in favor of the judgment creditor.¹ This diversity can be attributed to the fact that the creation of liens is now almost universally based upon statutory law. In order to determine the proper procedure to be followed by the judgment creditor, it is necessary to examine the applicable statutes of the state in which the judgment is rendered. Not only do statutes

²⁰ *Garner v. State*, — Miss. —, 2 So. 2d 828 (1941); *State v. Terrell*, 55 Utah 314, 186 P. 108 (1919).

¹ For a general discussion of the various state statutes and interpretations see 31 AM. JUR. 16 *et seq.*; 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 37 *et seq.* (1940).