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# Crimes--Homicide in Defense of Property

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seems to prevail in Indiana. *McCoy v. McCoy*, 32 Ind. App. 38, 69 N. E. 193 (1903). But the vast amount of authority is to the contrary. *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283 (1892); *Van Epps v. Redfield*, 68 Conn. 39, 35 Atl. 809 (1896).

From the foregoing statements it will be seen that the principal case represents the modern view in Kentucky and also that this view is with the weight of authority to the extent of a pleading which clearly shows a case for the application of the Statute of Frauds. It is not inconsistent with this majority view when it allows the statute to be raised by demurrer although it does not appear on the face of the pleading that the contract is written or parol. The settled rule in Kentucky is that the pleader must allege a written contract or circumstances removing the case from the operation of the Statute of Frauds. If such were not the rule, undoubtedly Kentucky would follow the majority view that the statute could not be raised by demurrer.

The majority view appears preferable in the light of reason. If the pleader, who should undoubtedly be in a better position to state his case than any other, can do no more than state a contract, which, on its face, is unenforceable, then such pleading should be demurrable.

ROBERT E. HATTON, JR.

CRIMES—HOMICIDE IN DEFENSE OF PROPERTY.—While homicide in self-defense, and homicide in defense of habitation have historically been considered justifiable, there has been some confusion regarding homicide in defense of property other than habitation. Just how far may the owner go in defending his property? Does a mere trespass justify taking a human life? Are common law felonies and statutory felonies against property to be considered alike?

A recent Kentucky case, *Commonwealth v. Beverly*, 237 Ky. 35, 34 S. W. (2d) 941 (1931), involved the right of a citizen to kill another apprehended at night in the act of stealing his chickens. The jury in the lower court did not agree, and the Court of Appeals was asked to certify the law in the case. The defendant shot without warning and continued to fire after repeated requests to stop. He had no evidence that the men were armed, but testified that he feared for his life. The Court of Appeals certified that the defendant was entitled to an instruction on self-defense carrying the idea that he shot in good faith on reasonable grounds to apprehend immediate danger to his life, but that the jury should also be informed that the defendant could be found guilty of voluntary manslaughter on the theory that he used more force than reasonably necessary to prevent the taking of the chickens. While taking chickens valued at more than three dollars is a statutory felony in Kentucky, the law does not justify the taking of human life to prevent a felony not involving the security of the person or home, or in which violence is not a constituent part.

Kentucky is in accord with the majority of jurisdictions on this point. *State v. Terrill*, 55 Utah 314, 186 Pac. 108 (1919); *Wallace v. U. S.*, 162 U. S. 466, 16 S. Ct. 859 (1896); *Oldacre v. State*, 196 Ala. 690, 72 So. 303 (1916). One state, Texas, has a statute making killing justifiable when property is being stolen at night or while the thief is within gunshot of the scene of theft. *Teague v. State*, 84 Tex. Cr. R. 169, 206 S. W. 193 (1918).

Even Texas, however, apparently limits this statute to offenses which are more serious than misdemeanors. See *McKinney v. State*, 96 Tex. Cr. R. 342, 257 S. W. 258 (1924), which holds that killing a boy in defendant's melon patch at night, in view of Penal Code 1911, art. 1234, making the act of taking melons from a farm a misdemeanor only, is not within art. 1105 making killing justifiable if committed to prevent a theft by night. When the aggression against the property is made in the daytime, every effort must be made to repel the aggression before killing is justified. *Richardson v. State*, 91 Tex. Cr. R. 318, 239 S. W. 218 (1922).

The distinction as to thefts at night is apparently based on the idea that apprehension of the thief is much more difficult. Kentucky and jurisdictions in accord would probably give weight also to the fact that darkness increases apprehension of personal danger, since it is impossible to see whether the wrongdoer is armed.

Just how far may one go in defending his property? Kentucky and concurring jurisdictions seem to hold that one may use any method short of taking human life or inflicting grave bodily injury. *Stacy v. Com.*, 189 Ky. 402, 225 S. W. 37 (1920), says that an owner in possession of either real or personal property has a right to use such means as in the exercise of reasonable judgment are necessary to protect his premises from forcible invasion and to prevent the forcible attempt to divest him of possession of his personal property, and in defense of his rights, an assault and battery upon the trespasser will be justified. But in no case is the taking of life or the infliction of great bodily harm allowable where the invasion is made without actual force even though forcible in law, and even if a trespass is made with actual force, the right to take life does not arise until the trespasser assaults the owner and there are reasonable grounds to believe that it is necessary to kill or wound to protect life or to prevent great bodily injury. See also *Bozeman v. State*, 150 Ga. 667, 104 S. E. 640 (1920); *State v. McCracken*, 122 N. M. 588, 166 P. 1174 (1917); *State v. Holbrook*, 98 or 43, 193 Pac. 434 (1920).

Even self-defense will not always avail the defendant as an excuse, if he killed after inviting the combat himself in cases where the trespass was completed before the altercation arose. *Doneghy v. Com.*, 208 Ky. 500, 271 S. W. 586 (1925).

If all the elements needed to justify killing to defend one's property are present, how long does the right to kill continue? Does it end as soon as the crime is technically complete, or continue so as to allow killing during pursuit to stop the wrongdoer and retake the

property? Missouri holds that the right of the owner to use force is not confined to the immediate time and place of taking, but continues though the property is taken temporarily out of his sight if pursuit is immediate. *State v. Dooley*, 121 Mo. 591, 26 S. W. 558 (1894). However, killing in retaking property fraudulently or forcibly taken is not justified when more force is used than is necessary for the retaking; the amount of force which may be reasonably used is a question of fact for the jury under the particular circumstances of the case. *Com. v. Donahue*, 148 Mass. 529, 20 N. E. 171 (1889). Kentucky holds that the right to defend against robbery remains with the owner as long as his property is in his immediate presence, and killing of the robber will prevent its being taken away. *Flynn v. Com.*, 204 Ky. 572, 264 S. W. 1111 (1924). This apparently does not allow killing while in pursuit of the wrongdoer from the scene of the crime unless personal danger is feared, but does allow homicide after the technical completion of the crime.

The right to kill in defending one's habitation against intruders has long been established. This, however, partakes almost entirely of the right to self-defense and defense of those in one's care rather than the right to defend one's property. See *Wharton's Homicide* (3rd. Ed.), sec. 530.

The right to defend real property other than habitation follows closely the rules regarding defense of personal property. Bare trespass does not warrant the owner in killing to prevent it. *Chapman v. Com.*, 12 K. L. R. 704, 15 S. W. 50 (1891). He can use such force as is necessary to get the intruder off the premises, but must not use force with intent to inflict bodily injury. *Tiffany v. Com.*, 121 Pa. 165, 6 Am. St. Rep. 775 (1888); *State v. Warren*, 1 Marv. (Del.) 487, 41 Atl. 190 (1893). It is a general rule that the use of spring guns is unlawful, and the owner is guilty of murder if death results. *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159 (1863). He can, of course, repel force with force, based upon the idea of self-defense.

To summarize: The right to kill in defense of real and personal property is in the main an extension of the right of self-defense. In the absence of statutory provision to the contrary, unless his life is in danger or grave bodily harm is threatened, the owner may only use methods of defending his property which do not involve danger of death or grave bodily injury to the wrongdoer. He may repel force with force, but he uses excessive force at his own peril. The reasonableness of the owner's apprehension of death or grave injury to his person, and the amount of force that he may reasonably use under the particular circumstances of the case are questions of fact for the jury.

ELEANOR DAWSON.

#### SALES—LIABILITY OF RESTAURANT OWNER FOR SERVING UNFIT FOOD.

—In the case of *Friend v. Child's Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (1918), the plaintiff entered the defendant's restaurant and