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The Right to Kill in Resisting an Illegal Arrest

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NOTES

THE RIGHT TO KILL IN RESISTING AN ILLEGAL ARREST

It is uniformly held that every citizen has the right to resist an unlawful restraint upon his personal liberty. As to the right to resist an illegal arrest in general, a person may use such force as is necessary to gain his freedom. *State v. Randall,* 118 S. C. 158, 110 S. E. 123 (1921). From this it is seen that the amount of force allowed must be in proportion to that which is used by the person attempting to make the arrest. It would appear from a strict logical interpretation of this rule that such right to use force could possibly include the right to take the life of the party attempting the illegal arrest, if such force were *necessary.*

It is at this point that the authorities part company.

Most courts hold that the right to resist an unlawful arrest is a phase of the right of self-defense; that as in other cases of self-defense the person sought to be arrested is justified in taking life only when he has reasonable ground to apprehend that he is in imminent danger of death or great bodily harm; that killing is not justified merely for the purpose of resisting an unlawful arrest or other restraint upon his liberty, where the only injury which could be reasonably apprehended is an unlawful detention for a short time or other injury short of death or great bodily harm. These courts hold that an officer attempting to make an unlawful arrest is simply the aggressor and stands in the shoes of any other aggressor in like difficulty. A few courts hold that a person has a right to resist an unlawful arrest, even to the extent of taking the life of the officer seeking to make the arrest, if it be necessary to do so to regain his freedom, or if it is necessary as an alternative to submission. These courts hold that a person has as much right to resist such an invasion as he has to resist death or serious bodily harm; that the right to resist an unlawful arrest and the right of self-defense are fundamentally separate and distinct. *Wilkinson v. State,* 143 Miss. 324, 108 So. 711 (1926). Under the majority rule, if the person sought to be illegally arrested kills

the person undertaking to arrest him, and fails to meet the requirements for a defense of self-defense, he will be guilty of manslaughter, unless the circumstances show malice. *Muscoe v. Commonwealth,* 86 Va. 443, 10 S. E. 534 (1890). But under the minority rule, it is a complete defense for the defendant to show that it was necessary to kill in order to protect his freedom. *Simmerman v. State,* 14 Nebr. 568, 17 N. W. 115 (1883).

It is worthy of comment that in 30 *Corpus Juris* 77, South Carolina is cited in the footnote therein as supporting the minority view.

In *State v. Davis,* 53 S. C. 150, 31 S. E. 62 (1898), Mr. Justice Pope, speaking for the court, said that the charge of the presiding judge to the effect " * * * that the law only allows the plea of self-defense where the act is done in defense of life and limb, not in the defense of liberty, * * * where there is a mere restraint to a person's liberty, it is better to submit even to the illegal restraint, rather than take the life of his fellow man" was incorrect, and proceeded to hold that "one unlawfully arrested may lawfully escape and he has the right to use as much force as may be necessary to regain his liberty, even to the actual taking of life. * * * the right of a man to resist an injury to life or body and the right to resist an invasion of his personal liberty occupy the same plane." The court, in laying down this rule, did not cite any South Carolina case as authority.

But in *State v. Byrd,* 72 S. C. 104, 51 S. E. 542 (1905), the court, after holding that the arrest was not illegal, said "even if the attempted arrest was illegal, an illegal arrest is usually nothing more than a trespass and does not excuse a homicide committed in resisting it, unless it appears that such killing was necessary in self-defense, that is, to prevent death or great bodily harm". For this statement the court cited 25 *A. & E. Ency. Law,* 2ed. 279, and made no reference to *State v. Davis,* supra.

In *State v. Bethune,* 112 S. C. 100, 99 S. E. 753 (1919), the question was squarely before the court, there was a killing and the legality of the attempted arrest was in issue. Upon exception by defendant's counsel that the right to resist an illegal arrest is distinct from the right of self-defense, the court, in sustaining this exception held that "the right to resist an unlawful arrest and the right of self-defense are

fundamentally separate and distinct. * * * a person may exercise his right to resist an unlawful arrest to the extent of taking the life of another, if it be necessary, in order for him to regain his freedom." Neither *State v. Davis*, supra, nor *State v. Byrd*, supra, were cited by counsel or in the opinion of the court. The court cites a number of South Carolina cases as authority for holding that a person may resist an unlawful arrest, even to the extent of taking the life of the aggressor. But a review of those cases shows that they are authority for the principle that a person has the right to resist an unlawful arrest, but, in none of them is it held that a person may resist an unlawful arrest to the extent of killing the aggressor merely for the purpose of regaining his freedom or preventing the unlawful detention.

In the lengthy case of *State v. Francis, et al*, 152 S. C. 17, 149 S. E. 348 (1929), the defendants were convicted of murder in the killing of a police officer which was the result of an affray which began from an attempt by the officer to arrest one of the defendants. The attempted arrest was held to be illegal. The court, in disposing of the many exceptions, had this to say in reference to that portion of the presiding judge's charge relating to the right to resist an illegal arrest: "A mere trespass on one's person or liberty is no reason for the taking of life, and if one commits a homicide while resisting an arrest, even though it is unlawful, he cannot justify on the ground of self-defense unless he can show that the killing was apparently necessary to protect himself from death or great bodily harm." For this statement the court cites 25 *A. & E. Ency.*, 279. *State v. Byrd*, supra, is, at this point, cited with approval. The court then stated the minority rule and voiced its disapproval to this view and continued with the statement " * * * the slayer is not excused unless he can show that the homicide was done in his necessary defense. He has no right, according to the better view, to take human life to prevent a mere trespass upon his person or liberty, when unaccompanied by any imminent danger of great bodily harm or felony." It is interesting to note that although the court cited *State v. Bethune*, supra, earlier in the decision in reference to another point, they did not mention that case when voicing disapproval to the minority view of the issue under discussion here.

Then in *State v. Robertson*, 191 S. C. 509, 5 S. E. (2d) 285 (1939), where the defendant was convicted merely for resisting arrest, the case was remanded for the failure of the presiding judge to charge the law in respect to resisting an illegal arrest, since the legality of the arrest was material issue at the trial. But the court went further and said "the law as to the right of a person to resist an unlawful arrest is well stated in *State v. Bethune*, where the court lays down the rule, citing numerous authorities, that a person has a right to resist an unlawful arrest, even to the extent of taking the life of the aggressor, if it be necessary, in order to regain his liberty". No mention is made to either *State v. Francis*, supra, or *State v. Byrd*, supra. Bear in mind that in this case there was no question as to the law *charged* by the presiding judge, the question on appeal was in respect to the *failure* of the judge to charge.

In view of the existing cases in South Carolina it would indeed be idle speculation to attempt to say what the law actually is in regards to the issue under discussion here. It might be stated, at this point, that the courts which follow the majority view base their holdings on the reasoning that the injury to be suffered by an illegal arrest is merely a *temporary* restraint of personal liberty, that there are sufficient laws to enable such person to regain his liberty, and, that illegal arrest is no more than a trespass which is not such an aggression as may be resisted with death. Such reasoning appears to be sound. But, until the Supreme Court of South Carolina disposes of this problem with finality, it appears that the door must remain ajar.

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