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Self-Defense in South Carolina

William T. Toal

SELF-DEFENSE IN SOUTH CAROLINA

I. Introduction

The principles of law governing self-defense[1] and related areas involving justifiable use of force have been laid down in early South Carolina cases and followed in later cases with little discussion of underlying policy questions. This note undertakes first to state what the law of self-defense is in South Carolina and second to discuss policy considerations in three areas in which the author feels different rules could be justified. Other possible changes in the law of self-defense, such as giving the original aggressor a modified right of self-defense when the other person switches from moderate to deadly force, deserve scrutiny, but only the most pressing problems have been discussed in this note.

II. Elements of Self-Defense

A. *Introduction*

The plea of self-defense is an affirmative defense. It is a perfect defense when all of the elements are established by the defendant by a preponderance of the evidence.[2] A mere preponderance is sufficient; it need not be "such a preponderance as that the jury shall come to the conclusion beyond a reasonable doubt . . . that the defendant is guilty."[3] To make out a plea of self-defense in South Carolina four things must be shown: First, the person must have thought the action necessary to prevent bodily harm or death; second, a person of ordinary reason and firmness in similar circumstances must think the action necessary; third, the person must have been without fault in bringing

1. "Self-defense", as used in this introductory paragraph, has the broad meaning: "The right of a man to repel force by force even to the taking of life in defense of his person, property or habitation, or of a member of his family . . . ." When used elsewhere in the note, "self-defense" has the limited meaning of "an excuse for the use of force in resisting an attack on the person . . . ."
Black's Law Dictionary 1525 (4th ed. 1951).

2. State v. Osborne, 202 S.C. 473, 25 S.E.2d 561, *cert denied*, 320 U.S. 763 (1943); State v. Strickland, 147 S.C. 514, 145 S.E. 404 (1928) (discussing only the element of fault); State v. Jones, 90 S.C. 290, 73 S.E. 177 (1912); State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909); State v. Thrailkill, 71 S.C. 136, 50 S.E. 551 (1905); State v. Petsch, 43 S.C. 132, 20 S.E. 993 (1895); State v. McIntosh, 40 S.C. 349, 18 S.E. 1033 (1894); State v. Way, 38 S.C. 333, 17 S.E. 39 (1893); State v. Bodie, 33 S.C. 117, 11 S.E. 624 (1890); State v. Welsh, 29 S.C. 4, 6 S.E. 894 (1888).

3. State v. Summers, 36 S.C. 479, 486, 15 S.E. 369, 371 (1892).

on the difficulty; and fourth, the person must have attempted to retreat prior to using force calculated to bring about death or great bodily harm.

Related defenses of resisting unlawful arrest, use of force in effecting arrest, defense of others, and defense of habitation are discussed in detail in the context of fault in bringing on the difficulty.

B. Necessity

"The plea of self defense rests upon the idea of necessity. . . ."[4] Perhaps all the elements of self-defense could be summed up in the word "necessity." For convenience, however, the element of faultlessness in bringing on the incident, called a "self-produced necessity,"[5] and the element of retreat, which, if possible, negatives the necessity for bloodshed, are placed in separate sections. The "necessity" which this section treats is the necessity of the present situation, regardless of prior events or possible avenues of retreat. To establish the right to self-defense the defendant must show that he thought his actions necessary to prevent bodily harm or death.[6] The necessity may be either real or apparent.[7] Evidence of threats previously communicated by the deceased are admissible to show the defendant's belief of impending danger.[8] A prior threat alone is insufficient unless accompanied by a demonstration of an immediate intention to execute that threat.[9] Mere knowledge of previous misconduct is

4. State v. Wyse, 33 S.C. 582, 594, 12 S.E. 556, 559 (1891).

5. State v. Trammell, 40 S.C. 331, 18 S.E. 940 (1894) (headnote 1 to South Carolina Reports).

6. *E.g.*, State v. Osborne, 202 S.C. 473, 25 S.E.2d 561, *cert. denied*, 320 U.S. 763 (1943); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942); State v. Herron, 116 S.C. 282, 108 S.E. 93 (1921); State v. Gandy, 113 S.C. 147, 101 S.E. 644 (1919); State v. Watson, 94 S.C. 458, 78 S.E. 324 (1913); State v. McKellar, 85 S.C. 236, 67 S.E. 314 (1910); State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909); State v. Foster, 66 S.C. 469, 45 S.E. 1 (1903); State v. Sullivan, 43 S.C. 205, 21 S.E. 4 (1895); State v. Wyse, 33 S.C. 582, 12 S.E. 556 (1891); State v. McGreer, 13 S.C. 464 (1880).

7. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Burnett, 210 S.C. 348, 42 S.E.2d 710 (1947); State v. Osborne, 202 S.C. 473, 25 S.E.2d 561 (1942), *cert. denied*, 320 U.S. 763 (1943); State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937); State v. Blackstone, 157 S.C. 278, 154 S.E. 161 (1930); State v. Davis, 121 S.C. 350, 113 S.E. 491 (1922); State v. Herron 116 S.C. 282, 108 S.E. 93 (1921); State v. Brown, 113 S.C. 513, 101 S.E. 847 (1919); State v. Jones, 90 S.C. 290, 73 S.E. 177 (1911); State v. Miller, 73 S.C. 277, 53 S.E. 426 (1906); State v. Foster, 66 S.C. 469, 45 S.E. 1 (1903); State v. Wyse, 33 S.C. 582, 12 S.E. 556 (1891).

8. State v. Mason, 215 S.C. 457, 56 S.E.2d 90 (1949); State v. Faile, 43 S.C. 52, 20 S.E. 798 (1895) (dictum).

9. *E.g.*, State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941).

insufficient to show a brief in the necessity to act.[10] If this necessity is shown, the defendant must also show that a man ordinarily constituted,[11] or a man having an ordinary amount of two of the following characteristics would have believed it necessary to act if similarly situated: courage,[12] firmness,[13] judgment,[14] prudence,[15] discretion,[16] and reason.[17]

C. Fault in Bringing on the Difficulty

1. *Generally.* A person claiming the right of self-defense must be without fault in bringing on the difficulty.[18] This means that the defendant must not have been the aggressor nor have provoked the difficulty himself.[19] Thus the use of language rea-

10. *E.g.,* State v. Emerson, 78 S.C. 83, 58 S.C. 974 (1907).

11. State v. Rish, 104 S.C. 250, 88 S.E. 531 (1916).

12. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Burnett, 210 S.C. 348, 42 S.E.2d 710 (1947); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942); State v. Brown, 113 S.C. 513, 101 S.E. 847 (1920); State v. Gandy, 113 S.C. 147, 101 S.E. 644 (1919); State v. Hollis, 108 S.C. 442, 95 S.E. 74 (1918); State v. Coyle, 86 S.C. 81, 67 S.E. 24 (1910); State v. Foster, 66 S.C. 469, 45 S.E. 1 (1903).

13. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942); State v. Brown, 113 S.C. 513, 101 S.E. 847 (1920); State v. Moody, 94 S.C. 26, 77 S.E. 713 (1913); State v. Watson, 94 S.C. 458, 78 S.E. 324 (1913); State v. Coyle, 86 S.C. 81, 67 S.E. 24 (1910); State v. McKellar, 85 S.C. 236, 67 S.E. 314 (1910); State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909); State v. Thrailkill, 71 S.C. 136, 50 S.E. 551 (1905); State v. Hutto, 66 S.C. 449, 45 S.E. 13 (1903); State v. Whittle, 50 S.C. 297, 37 S.E. 923 (1901); State v. Petsch, 43 S.C. 132, 20 S.E. 993 (1895); State v. Sullivan, 43 S.C. 205, 21 S.E. 4 (1895); State v. Symmes, 40 S.C. 383, 19 S.E. 16 (1894); State v. Wyse, 33 S.C. 582, 12 S.E. 556 (1891); State v. Jackson, 32 S.C. 27, 10 S.E. 769 (1890); State v. McGreer, 13 S.C. 464 (1880).

14. State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937).

15. State v. Burnett, 210 S.C. 348, 42 S.E.2d 710 (1947); State v. Hollis, 108 S.C. 442, 95 S.E. 74 (1918); State v. Moody, 94 S.C. 26, 77 S.E. 713 (1912); State v. Thrailkill, 71 S.C. 136, 50 S.E. 551 (1905); State v. Foster, 66 S.C. 469, 45 S.E. 1 (1903); State v. Whittle, 59 S.C. 297, 37 S.E. 923 (1901).

16. State v. Jackson, 32 S.C. 27, 10 S.E. 769 (1889).

17. State v. Gandy, 113 S.C. 147, 101 S.E. 644 (1919); State v. Watson, 94 S.C. 458, 78 S.E. 324 (1913); State v. McKellar, 85 S.C. 236, 67 S.E. 314 (1910); State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909); State v. Hutto, 66 S.C. 449, 45 S.E. 13 (1903); State v. Petsch, 43 S.C. 132, 20 S.E. 993 (1895); State v. Sullivan, 43 S.C. 205, 21 S.E. 4 (1895); State v. Symmes, 40 S.C. 383, 19 S.E. 16 (1894); State v. Wyse, 33 S.C. 582, 12 S.E. 556 (1891); State v. McGreer, 13 S.C. 464 (1880).

18. *E.g.,* State v. McAlister, 149 S.C. 367, 147 S.E. 310 (1929); State v. Strickland, 147 S.C. 514, 145 S.E. 404 (1928); State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926); State v. Harvey, 110 S.C. 274, 96 S.E. 399 (1918); State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909); State v. Dean, 72 S.C. 74, 51 S.E. 524 (1905); State v. Foster, 66 S.C. 469, 45 S.E. 1 (1903); State v. Petsch, 43 S.C. 132, 20 S.E. 993 (1895); State v. Wyse, 33 S.C. 582, 12 S.E. 556 (1891); State v. Beckham, 24 S.C. 283 (1886).

19. State v. Foster, 66 S.C. 469, 45 S.E. 1 (1903).

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sonably calculated to bring on difficulty deprives the defendant of the plea.[20] This is true even if the language is directed toward someone under the care of the person who is provoked into attack rather than at him personally.[21] The right of self-defense is not lost when the opprobrious words are used in reply to a similar attack.[22] The use of insulting words alone does not justify the use of force, and the person replying with force is not without fault,[23] but words accompanied by a hostile act may justify the use of force.[24] Despite the impassioned plea of one self-styled "old-fashioned" judge who believed that men should "fight for their women," impugning the chastity of a woman does not give her family or friends the right to use force.[25]

A simple trespass is not such fault as to bar self-defense.[26] A trespass reasonably calculated to precipitate a conflict is.[27] Thus, going on the premises of one with whom the defendant had had previous difficulties that same afternoon might be such fault as to preclude the defense.[28]

The prevention of an unlawful act is not a fault in bringing on an encounter.[29] One may use force to prevent the illegal act only if the act is committed in his presence and only after protest.[30]

The touching of another person is sometimes privileged. Thus that touching is not considered fault. A father, for example, has the right to chastise his son.[31] A Negro on a street car has

20. State v. Woodham, 162 S.C. 492, 160 S.E. 885 (1931); State v. Council, 129 S.C. 116, 123 S.E. 788 (1924); State v. Davis, 121 S.C. 350, 113 S.E. 491 (1922); State v. English, 115 S.C. 535, 106 S.E. 781 (1920); State v. Duncan, 86 S.C. 370, 68 S.E. 684 (1910); State v. Lee, 85 S.C. 101, 67 S.E. 141 (1910); State v. Rowell, 75 S.C. 494, 56 S.E. 23 (1906).

21. State v. Schuler, 116 S.C. 152, 107 S.E. 147 (1921); State v. Ferguson, 91 S.C. 235, 74 S.E. 502 (1912).

22. State v. Wright, 161 S.C. 64, 159 S.E. 492 (1931).

23. State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941); State v. Morrison, 121 S.C. 11, 113 S.E. 304 (1922); State v. Driggers, 84 S.C. 526, 66 S.E. 1042 (1910); State v. Jackson, 32 S.C. 27, 10 S.E. 769 (1890); State v. Jacobs, 28 S.C. 29, 4 S.E. 799 (1888).

24. State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920); State v. Jackson, 32 S.C. 27, 10 S.E. 769 (1890); State v. Turner, 29 S.C. 34, 6 S.E. 891 (1888).

25. State v. Swygert, 130 S.C. 91, 114, 124 S.E. 636, 643 (1924).

26. State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923); State v. Emerson, 78 S.C. 83, 58 S.E. 974 (1907).

27. State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923).

28. State v. Brown, 113 S.C. 513, 101 S.E. 847 (1920).

29. State v. Burdette, 118 S.C. 164, 101 S.E. 664 (1919) (illegal intercourse with sister of person using force); State v. Douglas, 115 S.C. 482, 101 S.E. 648 (1919) (elopement of underage girl).

30. State v. Burdette, 118 S.C. 164, 101 S.E. 664 (1919).

31. State v. Starks, 88 S.C. 122, 70 S.E. 436 (1911).

the right to steady himself by touching a white passenger, but the court held that the privilege might be lost if there were no apology with the proper amount of deference.[32]

Although a person is initially without fault in bringing on a difficulty, he may be at fault, and thus lose the right of self-defense, by responding with a disproportionate amount of force.[33] The amount of force justified is not limited to the degree or quantity of the opposing force but rather can be that amount reasonably necessary for self-protection.[34]

On occasion persons at fault in bringing on a difficulty have asked the courts to adopt a rule allowing them the right of self-defense when their adversary initiates the use of force likely to cause death. The arguments have never persuaded the court.[35]

Fault is also found in one who opposes the lawful use of force as prescribed by the rules in the sections immediately following.

2. *Resisting Unlawful Arrest.* A person has the right to resist unlawful arrest, in order to regain his liberty,[36] even to the extent of taking the life of his aggressor if that be necessary.[37] The circumstances under which the person being unlawfully arrested could kill to resist the unlawful arrest have varied. An early case stated that there was no distinction between the right to resist a bodily injury and the right to resist an invasion of personal liberty.[38] The jury was to determine if the facts and circumstances of each case justified "the taking of the life of the person who shall seemingly jeopardize . . . the liberty of the

32. State v. Wilson, 115 S.C. 248, 105 S.E. 341 (1920).

33. *E.g.*, State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945); State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925); Golden v. State, 1 S.C. 292 (1870); State v. Lazarus, 1 Mill. Const. 34 (S.C. 1817); State v. Wood, 1 Bay 351 (S.C. 1794).

34. State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918).

35. *E.g.*, State v. Randall, 118 S.C. 158, 110 S.E. 123 (1921); State v. Jacobs, 28 S.C. 29, 4 S.E. 799 (1888); State v. Beckham, 24 S.C. 283 (1886).

36. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Robertson, 191 S.C. 509, 5 S.E.2d 285 (1939); State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929); State v. Lowman, 134 S.C. 485, 133 S.E. 457 (1926); State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919); State v. Shaw, 104 S.C. 359, 89 S.E. 322 (1916); State v. Davis, 53 S.C. 150, 31 S.E. 62 (1898); State v. Higgins, 51 S.C. 51, 28 S.E. 15 (1897); State v. Wimbush, 9 S.C. 309 (1878); State v. Hailey, 2 Strob. 73 (S.C. 1847); Florence v. Berry, 61 S.C. 237, 39 S.E. 389 (1901) (dictum); Davis v. Sanders, 40 S.C. 507, 19 S.E. 138 (1894) (dictum).

37. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Robertson, 191 S.C. 509, 5 S.E.2d 285 (1939); State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919); State v. Davis, 53 S.C. 150, 31 S.E. 62 (1898).

38. State v. Davis, 53 S.C. 150, 31 S.E. 62 (1898). *Contra,* State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919).

person assailed."[39] A later case[40] said that "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. . . ."[41] This rule was continued in *State v. Francis*[42] in which the court said that a person is "justified in using . . . a deadly weapon only where he has reason to apprehend an injury greater than the mere unlawful arrest. . . ."[43] and "has no right . . . to take human life to prevent a mere trespass upon his person or liberty. . . ."[44] In the latest case involving resistance of unlawful arrest[45] the person being arrested was said to have the right to use such force as was apparently necessary to accomplish his deliverance and no more.

The problem in cases involving the defense of resisting unlawful arrest is often whether or not the instant arrest is lawful. Without covering the law of arrest extensively, some general guidelines can be drawn. The 1962 South Carolina Code, section 17-251, provides: "Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief. . . ."[46] Under this section any person may arrest on reliable information that a felony has been committed, and there is a duty on the part of the person being arrested to submit to the arrest.[47] Section 17-253 provides: "The sheriffs . . . of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter."[48] An officer may not arrest without a warrant for misdemeanors committed outside his view or hearing[49] and

39. State v. Davis, 53 S.C. 150, 154, 31 S.E. 62, 63 (1898).

40. State v. Byrd, 72 S.C. 104, 51 S.E. 542 (1905).

41. *Id.* at 107, 51 S.E. at 543.

42. 152 S.C. 17, 149 S.E. 348 (1929).

43. *Id.* at 39, 149 S.E. at 356.

44. *Id.* at 39, 149 S.E. at 356.

45. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955).

46. S.C. CODE ANN. § 17-251 (1962). See S.C. CODE ANN. § 17-252 (1962) for other circumstances under which citizens may arrest.

47. Burton v. McNeill, 196 S.C. 250, 13 S.E.2d 10 (1941); State v. Griffin, 74 S.C. 412, 54 S.E. 603 (1906).

48. S.C. CODE ANN. § 17-253 (1962); *accord,* State v. Bowen, 17 S.C. 58 (1882).

49. In State v. Williams, 36 S.C. 493, 15 S.E. 554 (1892), by implication, a legal arrest could have been made by the mayor of Spartanburg for a disturbance of the peace committed out of his sight but within his hearing.

the person being arrested has the right to resist.[50] The officer may arrest without a warrant, however, for offenses not committed in his sight in special circumstances indicating an emergency.[51] If the warrant does not meet the technical requirements for a valid warrant the arrest is invalid.[52] If, however, the officer is only a *de facto* officer, the person being arrested has no more right to resist than if he were a *de jure* officer.[53] The right to resist an unlawful arrest does not attach merely because a person is told that he is under arrest,[54] or because the officer fails to state his official character,[55] or because the officer knocks on a person's front door to inquire about a misdemeanor not committed in his presence.[56] In all of these instances the person should make inquiry into the authority for the arrest. Even if the right to resist unlawful arrest comes into existence by action on the part of the officer, the right terminates when the officer desists from his illegal purpose and that fact is apparent to the person sought to be arrested.[57] Of course, the fact that an officer has a valid warrant for arrest does not make his killing a culpable homicide if the authority of the officer is not made known and the killing can be justified on another ground.[58]

3. *Effecting a Lawful Arrest.* A person may justifiably use force in effecting a lawful arrest. If he uses force to effect an unlawful arrest, he is criminally liable.[59] The person making the unlawful arrest cannot thereafter avail himself of the plea of self-defense because he is not without fault in provoking the

50. State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929); State v. Randall, 118 S.C. 158, 110 S.E. 123 (1921); State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919); State v. Shaw, 104 S.C. 359, 89 S.E. 322 (1916); State v. Davis, 53 S.C. 150, 31 S.E. 62 (1898).

51. State v. Rivers, 186 S.C. 221, 196 S.E. 6 (1938) (person arrested hunting persons with whom he had earlier fought); State v. Sims, 16 S.C. 486 (1882) (fresh pursuit by police); *cf.*, Town of Branchville v. Felder, 86 S.C. 280, 68 S.E. 575 (1910); Percival v. Bailey, 70 S.C. 72, 49 S.E. 7 (1904).

52. State v. Higgins, 51 S.C. 51, 28 S.E. 15 (1897).

53. State v. Messervy, 86 S.C. 503, 68 S.E. 766 (1910) (alternate holding).

54. State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929).

55. State v. Luster, 178 S.C. 199, 182 S.E. 427 (1935); State v. Shaw 104 S.C. 359, 89 S.E. 322 (1916); State v. Byrd, 72 S.C. 104, 51 S.E. 542 (1905).

56. State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941).

57. State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929).

58. State v. Lowman, 134 S.C. 485, 133 S.E. 457 (1926).

59. State v. Randall, 118 S.C. 158, 110 S.E. 123 (1921); State v. Jones, 104 S.C. 141, 88 S.E. 444 (1916); State v. Whittle, 59 S.C. 297, 37 S.E. 923 (1901).

incident.[60] In this area, as in the area of resisting unlawful arrest, there is the problem of determining which arrests are lawful. This problem will not be discussed again here as a lawful arrest makes resistance unlawful and lawful resistance means that the attempted arrest is unlawful. Assuming that an arrest is lawful there is a limit to the amount of force which the officer may use in effecting the arrest. The amount of force justified depends on the response of the person being arrested.[61] A classic example of the justification of use of force great enough to kill is given in *State v. Anderson.*[62]

> But then suppose, that either before the arrest, or after the arrest, B draws his sword and assaults A, and A presseth upon him either to take or detain him, and in the conflict, B kills A, it is murder in B; or if A kills B, it is justifiable, and no felony in A.[63]

Passive resistance will not justify a killing[64] and active resistance does not justify an unlimited use of force.[65]

> The force applied must have a due regard to the purpose it is to accomplish. It is allowed, when it may be necessary to overcome, by its interposition, the violence which is opposed to prevent the due exercise of the authority with which the officer is charged. If it proceeds beyond the limit of the necessity which originally permitted its use, it is no justification.[66]

The later case of *State v. Franklin*[67] leaves some doubt in this area and suggests that the officer may be justified in using deadly force in effecting a capture whether or not his life is endangered. There the defendant was convicted on a charge of murder of a constable. The judge charged the jury that "if

60. State v. Randall, 118 S.C. 158, 110 S.E. 123 (1921).

61. Golden v. State, 1 S.C. 292 (1870); State v. Anderson, 1 Hill 327 (S.C. 1833); Arthur v. Wells, 2 Mill. Const. 314 (S.C. 1818) (a civil case upholding liability for shooting runaway slave).

62. 1 Hill 327 (S.C. 1833).

63. *Id.* at 344-45. The court purports to quote 2 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 83 (1847), but the language there is ". . . *is it* murder in B or if A kills B *is it* justifiable and no felony in A?" (emphasis added.)

64. State v. Anderson, 1 Hill 327 (S.C. 1833).

65. Golden v. State, 1 S.C. 292 (1870).

66. *Id.* at 302.

67. 80 S.C. 332, 60 S.E. 953 (1908), *aff'd sub nom.* Franklin v. South Carolina, 218 U.S. 161 (1910).

[a man] refuses to submit to the arrest, then the officer has the right to go to whatever length is necessary to make him submit."[68] The court said the circuit judge "made no mistake." The precise issue involved in the case was whether the officer could break into the house when he received no response to his knock, but the statements may be authority for the proposition that an officer may use deadly force for the purpose of effectuating a capture. But in *State v. Jones*[69] there is dictum to the effect that these rules apply only when arrest is resisted but not when an escape is attempted. The court said: "[I]t is better that one guilty of the commission of a misdemeanor escape than his life be forfeited or that he suffer serious bodily injury."

In one interesting civil case for false imprisonment the judge "correctly charged . . . that one making the arrest must be actuated by good motives with one view and that of assisting in bringing to justice a felon, who had violated the law, and that he did not have an ulterior motive."[70] If this principle were carried over to criminal cases, an officer or private citizen, making an otherwise lawful arrest, would be criminally liable for his actions if the reason for the arrest were personal.

4. *Defense of Habitation.* "[A] man's house is his castle . . . ."[71] Out of the underlying reason for this ancient maxim, rules have been formulated giving a person the right to use force in expelling unwanted persons from his home under some circumstances. The landmark case in this area, *State v. Bradley*,[72] wisely divides the law of habitation into four situations: First, when the occupant is the slayer and stands on the right to protect his habitation, apart from the plea of self-defense; second, when the occupant is also the slayer and stands upon his right of self-defense claiming immunity not from the right to protect his habitat, but from the law of retreat; third, when the occupant is the slain and the homicide occurred while he was in the exercise of his right to protect his habitation; and fourth, when the occupant is also the slain, and the homicide occurred while he was attempting to eject a trespasser from a part of the premises outside of his habitation.

68. *Id.* at 338, 60 S.E. at 955. *But cf.* State v. Suddeth, 74 S.C. 498, 54 S.E. 1013 (1906).

69. 211 S.C. 300, 305, 44 S.E.2d 841, 843-44 (1947).

70. Safran v. Meyer, 103 S.C. 356, 364, 88 S.E. 3, 4 (1916).

71. 3 COKE, INSTITUTES 162 (1644).

72. 126 S.C. 528, 120 S.E. 240 (1923).

In the first situation the owner relies on the right of persons within the house to keep aggressors out. Thus when a man is assaulted in his home he may use such force as is necessary to protect himself or a member of his family from injury and combine such force as is reasonably necessary to eject the assailant, even to the extent of taking life.[73] If the person to be expelled is an invited guest,[74] or accompanying an officer on a lawful arrest,[75] or on the premises to settle a quarrel,[76] there must be a request by the owner that the person leave prior to the use of force for expulsion. The person need not leave immediately but has a reasonable time in which to depart.[77] If the person requested to leave refuses, the force necessary or apparently necessary to eject him may be used.[78] A guest in the home of the owner has the same opportunity to defend the habitation "as if he were under his own roof or within his own doors."[79] The proprietor of a business has the right to eject a trespasser by using such force, short of killing the trespasser, as is necessary to accomplish the ejection.[80] The right to defense of habitation ceases as soon as the danger has passed.[81] It is possible that the right to defend the habitation extends beyond the house itself. In *State v. Brooks*[82] the person slain was two hundred

73. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Sparks, 179 S.C. 135, 183 S.E. 719 (1936); State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923).

74. State v. Bodie, 213 S.C. 325, 49 S.E.2d 575 (1948); State v. Starnes, 213 S.C. 304, 49 S.E.2d 209 (1948); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942) (appeal from retrial 202 S.C. 473, 25 S.E.2d 561, *cert. denied*, 320 U.S. 763 (1943) did not involve this point); State v. Sparks, 179 S.C. 135, 183 S.E. 719 (1936); State v. Waldrop, 73 S.C. 60, 52 S.E. 793 (1905); State v. McIntosh, 40 S.C. 349, 18 S.E. 1033 (1894); State v. Lazarus, 1 Mill. Const. 34 (S.C. 1817); State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923) (dictum).

75. State v. Williams, 76 S.C. 135, 56 S.E. 783 (1907).

76. State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928).

77. *Id.*

78. State v. Starnes, 213 S.C. 304, 49 S.E.2d 209 (1948); State v. Sparks, 179 S.C. 135, 183 S.E. 719 (1936); State v. Williams, 76 S.C. 135, 56 S.E. 783 (1907).

79. State v. Bodie, 213 S.C. 325, 329, 49 S.E.2d 575, 577 (1948); State v. Osborne, 200 S.C. 504, 515, 21 S.E.2d 178, 182 (1942), *quoting from* Annot., 25 A.L.R. 508, 522 (1923).

80. State v. Rogers, 130 S.C. 426, 126 S.E. 329 (1925) (dictum). The dictum is supported by State v. Starnes, 213 S.C. 304, 316, 49 S.E.2d 209, 213 (1948) in which the court says "the occupant of a home or a place of business [may] use such force as may be reasonably necessary . . . to eject a trespasser . . . ." The incident involved in this case took place in a building which was both defendant's home and his place of business.

81. State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909).

82. 79 S.C. 144, 60 S.E. 518 (1908).

yards from the house, but the court, in holding that the defendant did not have to retreat, gave as the reason that "defendant has a right to eject [the trespasser]."[83] In *State v. Bradley*[84] the right of the occupant to expel a trespasser was "limited to the place of his habitation (or perhaps of his curtilage [citing *State v. Brooks*]), it did not exist . . . at a more remote place on the premises. . . ."[85] Defense of habitation is not available when both parties to the fracas stand on equal ground, *i.e.*, both have the right to be in the habitation.[86]

The situation in which the occupant is the slayer and stands on his right to self-defense claiming immunity from the law of retreat is covered in the section on retreat.

In the third and fourth situations the person slain is the owner of the premises. If the owner in using force is protecting his habitation, then the slayer is not without fault in bringing on the incident and cannot rely on the justification of self-defense.[87] If, however, the ejection is wrongful under the principles previously discussed, the person being ejected is without fault in bringing on the incident and can rely on a plea of self-defense providing the other elements are established.[88]

5. *Defense of Others.* Under certain circumstances a person is justified in using force to protect a third person. The South Carolina rule on defense of others was laid down in *State v. Cook.*[89] "[A] person who [interferes in a difficulty between two others] will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing . . . ."[90] This rule has been adhered to in the later cases.[91] The person rescued

83. *Id.* at 149, 60 S.E. at 520.

84. 126 S.C. 528, 120 S.E. 240 (1923).

85. *Id.* at 537, 120 S.E. at 243.

86. State v. Smith, 226 S.C. 418, 85 S.E.2d 409 (1955).

87. State v. Burnett, 210 S.C. 348, 42 S.E.2d 710 (1947); State v. Bradley 126 S.C. 528, 120 S.E. 240 (1923).

88. State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923). *But cf.* State v. Brown, 113 S.C. 513, 101 S.E. 847 (1920) in which the court said fault could be found by the jury from the fact that defendant went on the premises of a person with whom he had had a previous difficulty that day.

89. 78 S.C. 253, 59 S.E. 862 (1907).

90. *Id.* at 257, 59 S.E. at 863, *quoting from* F. WHARTON, THE LAW OF HOMICIDE 332 (3d ed. 1907).

91. *See* State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944); State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929); State v. Hays, 121 S.C. 163, 113 S.E. 362 (1922); State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918).

must have had no other reasonable means of escape[92] and must have been without fault in provoking the incident.[93] The person claiming the right must likewise be without fault in provoking the incident.[94] The defense is not available unless there is a necessity[95] or apparent necessity[96] to use the force. Although some of the cases refer to the right of a father and son to protect each other[97] or of someone to defend another who is his spouse, parent or child,[98] other cases make clear that the right extends to a relative, friend or bystander.[99]

D. Retreat

A person using force likely to cause death or great bodily harm may not ordinarily claim the justification of self-defense unless there is no reasonable means of escape.[100] The general rule is that the retreat doctrine is not applicable to cases involving mere batteries.[101] When the battery is accompanied by use of force likely to cause death or great bodily harm, there is a duty to retreat.[102] The reasonable means of escape must be one which would be apparent to a man of ordinary prudence and courage.[103] The escape must be made only if it can be accom-

92. State v. Hays, 121 S.C. 163, 113 S.E. 362 (1922).

93. *Id.*; State v. Cook, 78 S.C. 253, 59 S.E. 862 (1907).

94. State v. Hays, 121 S.C. 163, 113 S.E. 362 (1922); State v. Harvey, 110 S.C. 274, 96 S.E. 399 (1918); State v. Cook, 78 S.C. 253, 59 S.E. 862 (1907).

95. Cases cited note 94 *supra.*

96. State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928). In this case the person slain was the one who could have asserted the defense. The issue was to determine who was at fault in bringing on the incident.

97. State v. Douglas, 115 S.C. 483, 101 S.E. 648 (1919).

98. State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944).

99. State v. Hays, 121 S.C. 163, 113 S.E. 362 (1922); State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918) (mentions "friends" and "relatives" only).

100. State v. Council, 129 S.C. 116, 123 S.E. 788 (1924); State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924); State v. Thomas, 103 S.C. 316, 88 S.E. 20 (1915); State v. Chastain, 85 S.C. 64, 67 S.E. 6 (1910); State v. McKellar, 85 S.C. 236, 67 S.E. 314 (1910).

101. 6 C.J.S. *Assault and Battery* § 92 (1937). The 1966 Cumulative Supplement to this section lists the South Carolina case of State v. Smith, 226 S.C. 418, 85 S.E.2d 409 (1955), as following the general rule. That case held, however, that the defendant was immune from the retreat doctrine because he was a guest in the home in which the alleged assault and battery took place. This author has found no South Carolina case directly on point.

102. State v. Davis, 121 S.C. 350, 113 S.E. 491 (1922) (pitchfork); State v. McKellar, 85 S.C. 236, 67 S.E. 314 (1910) (pistol). *See* State v. Smith, 226 S.C. 418, 85 S.E.2d 409 (1955) (knife); State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1928) (knife); State v. Quick, 138 S.C. 147, 135 S.E. 800 (1926) (pistol).

103. *E.g.*, State v. Council, 129 S.C. 116, 123 S.E. 788 (1924); State v. Thomas, 103 S.C. 316, 88 S.E. 20 (1916).

plished without increasing his danger,[104] or apparently or probably increasing it.[105] One who is on his own premises need not retreat. This applies to one who is in his own home or within its curtilage,[106] or in his place of business,[107] or on his own property outside the curtilage,[108] or is a guest in the home of another.[109] In South Carolina immunity from retreat even applies to a club member in club rooms.[110]

The rules were not always this way. In one case the court held that a person "attacked on his own premises by the deceased who was at that time on the public highway, or where he had a right to be . . . was bound to retreat. . . ."[111] In a case decided the same year the court held that the defendant was bound to retreat in the face of a simple assault before taking the life of the assailant.[112] Apparently neither counsel nor the court in the later case addressed themselves to the fact that defendant as well as the person slain claimed the right to possession of the house. The rule requiring retreat when the aggressor was in a place where he had a right to be was short-lived. In *State v. Gibbs*[113] both combatants were on their own property and the defendant had no duty to retreat. Similarly, when both parties live in the same home,[114] or are guests in the same home,[115] or are fellow-workmen at their job,[116] neither is required to retreat.

104. State v. George, 119 S.C. 120, 111 S.E. 880 (1921); State v. Petsch, 43 S.C. 132, 20 S.E. 993 (1895).

105. State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937); State v. Jones, 90 S.C. 290, 73 S.E. 177 (1912); State v. Rochester, 72 S.C. 194, 51 S.E. 685 (1905).

106. State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953); State v. Gibbs, 113 S.C. 256, 102 S.E. 333 (1920); State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908).

107. State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1928); State v. Rogers, 130 S.C. 426, 126 S.E. 329 (1925); State v. Gordon, 128 S.C. 422, 122 S.E. 501 (1924); State v. Bowers, 122 S.C. 275, 115 S.E. 303 (1923).

108. State v. Cleland, 148 S.C. 86, 145 S.E. 628 (1928); State v. Quick, 138 S.C. 147, 135 S.E. 800 (1926); State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923).

109. State v. Smith, 226 S.C. 418, 85 S.E.2d 409 (1955); State v. Osborne, 202 S.C. 473, 25 S.E.2d 561 (1942), *cert. denied*, 320 U.S. 763 (1943); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942).

110. State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1921).

111. State v. Rochester, 72 S.C. 194, 203, 51 S.E. 685, 688 (1905).

112. State v. Waldrop, 73 S.C. 60, 52 S.E. 793 (1905).

113. 113 S.C. 256, 102 S.E. 333 (1920); *accord*, State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944), where deceased was in the public highway.

114. State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953). *But see* State v. Stevenson, 85 S.C. 247, 67 S.E. 239 (1910).

115. State v. Smith, 226 S.C. 418, 85 S.E.2d 409 (1955).

116. State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1928); State v. Gordon, 128 S.C. 422, 122 S.E. 501 (1924).

The fellow-workmen need not be in an enclosure but may be outside on the job.[117] The person claiming immunity from retreat must be at the site of his job for a purpose related to his employment.[118] Defendants from time to time have pressed the court to give immunity from retreat when they are in a place where they have a right to be. This argument has never prevailed. Thus a defendant in the public road,[119] or on the ground surrounding a store where the public was invited,[120] or in the kitchen of a restaurant to complain about the food,[121] has a duty to retreat. But if the defendant goes on the land of another to prevent an unlawful act, he is under no duty to retreat.[122]

III. Areas of Study for Possible Changes

A. Defense of Others.

In South Carolina today a person coming to the rescue of a person in distress takes the chance that he may be committing a criminal offense. For the person rescued may have been at fault in bringing on the incident or may not have availed himself of a opportunity to retreat. The reason for the rule has been stated as follows:

> [T]he opposite rule would allow the innocent man who had been forced to strike in self-defense to be killed with impunity merely because appearances happened to be against him at the moment a partisan of his antagonist reached the scene of conflict. The duty seems urgent to enforce rather than relax the rule which admits of no excuse for taking human life except necessity.[123]

117. State v. Gordon, 128 S.C. 422, 122 S.E. 501 (1924). Both men were working at chopping trees on a farm.

118. State v. Davis, 214 S.C. 34, 51 S.E.2d 86 (1948).

119. State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937); State v. Babb, 88 S.C. 395, 70 S.E. 309 (1911); State v. Corley, 43 S.C. 127, 20 S.E. 989 (1895).

120. State v. Peeples, 126 S.C. 422, 120 S.E. 361 (1923).

121. State v. Trammell, 40 S.C. 331, 18 S.E. 940 (1894).

122. State v. Burdette, 118 S.C. 164, 101 S.E. 664 (1919). *But see* State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920). In the latter case the court refused to charge that a police officer attacked in the lawful exercise of his duties was under no duty to retreat. The opinion does not specify why the refusal of the charge was rightful, but there is some indication that the facts did not justify such a charge.

123. State v. Cook, 78 S.C. 253, 259, 59 S.E. 862, 864 (1907).

Mr. Justice Gary, dissenting in the same case, gave his reasons for using a rule allowing the use of force upon a reasonable, bona fide belief in the necessity for its use as follows:

> [A] person may set up the plea of self-defense if he actually believes he is in imminent danger of losing his life or suffering serious bodily harm, and under all the circumstances as they existed at the time the violence was inflicted the jury thinks he had just grounds for forming such belief; yet, . . . a rule more severe is applied when a person takes the life of another in order to prevent a felony upon a third party, although the law imposes upon him the duty of preventing such felony. It seems to me that there is even stronger reason for permitting the party taking the life of another to act upon a bona fide and well founded belief in the latter than in the former case.[124]

Leaving aside the questions of whether someone might be held for the killing in the first example or whether the law does impose a penalty for failure to prevent a felony in the second statement, the real issue is whether the law desires to encourage intervention by a third party who reasonably believes another needs his assistance. Should the innocent party who now has the upper hand be protected as against the innocent victim of crime who cries out for help? It is submitted that the law should encourage intervention by giving a justification for a force used with a reasonable belief in its necessity. The person who goes to the aid of a distressed fellow-citizen is rare enough without the added factor of possible criminal sanction for his supposed heroic deed.

B. Retreat

The immunity from retreat for one on his own premises is founded on the premise that a person confronted in his home should not be required to abandon his home to the attacker or be liable for the consequences if he remains. The policy question raised by the South Carolina cases is the scope of the immunity from retreat. South Carolina has wisely refrained, as seen in the section on retreat, from extending immunity to anyone who is

124. State v. Cook, 78 S.C. 253, 261-62, 59 S.E. 862, 865 (1907) (dissenting opinion).

in a place where he has a right to be.[125] The immunity has, however, been extended beyond desirable bounds. The detriment to a person in his club room or a person chopping wood in the forest and probably to a person who is a guest in another's home of being required to retreat does not justify the loss of a life. It may be easy to say that the person killed was hoist with his own petard, but the law can and should protect him from the effect of the blast by requiring retreat except when a person is within his own home or within his place of work.

C. Illegality of Arrest as Standard of Fault

In South Carolina today the criminal liability of the arresting officer who uses force in effecting the arrest and the person being arrested who uses force in resisting the arrest is determined by whether the arrest is legal. The arresting officer may be criminally liable for the use of force in effecting an illegal arrest. The person being arrested is justified in using force to prevent an illegal arrest but is at fault if he resists a legal arrest. The "unlawful arrest" standard is a highly complex legal standard. Judges often disagree on whether a particular arrest is in fact legal. Standards of this complexity ought not determine the criminal liability of a police officer. The police officer should be able to use force in making an arrest which he reasonably believes to be lawful. At the same time persons being arrested by a known police officer should not be able to resist an unlawful arrest unless the elements of self-defense are present. Modern habeas corpus proceedings tend to make the period of illegal detention shorter. Thus the protection of the policeman weighs heavier in the balance. The requirement of a reasonable belief in the legality of the arrest would mean that the results of relatively few cases would be changed, but, it is believed, those cases which might be changed would reach a better result.

The recommended changes in the law of self-defense are suggestions only. It may well be that the legislature or the courts upon reflection would deem it wiser to continue the present law. The points raised are indicative that certainly reflection, and possibly reform, is needed.

WILLIAM T. TOAL

125. For an example of a case espousing the opposite rule, see State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963).