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COMMENTS

JUSTIFIABLE HOMICIDE IN TEXAS

The Texas Penal Code defines murder as follows:

Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which *excuse* or *justify* the killing.¹ (Emphasis added.)

At common law homicide was justifiable only where the accused killed in strict performance of a legal duty or right.² An accidental killing while in pursuit of some lawful objective and a killing in self-defense where the slayer had become involved in a sudden affray or combat which he might have avoided were considered excusable,³ rather than justifiable. In these instances the slayer was considered, to some extent, at fault.⁴ The rather weak distinction (existence versus nonexistence of a legal duty or right) between justifiable and excusable homicide at common law has for the most part been abolished by the Penal Code.⁵ In any event, this Comment is concerned primarily with the specific provisions of the Code concerning justifiable homicide.⁶

¹ Tex. Pen. Code Ann. art. 1256 (1948).

² See Clark & Marshall, *The Law of Crimes* 415 (6th ed. 1958). Homicide classified as justifiable at common law includes the instances where a person (1) kills to prevent a felony by force or surprise, (2) kills while suppressing a riot, (3) kills while arresting a felon or preventing his escape, (4) kills to prevent a felonious attack upon his person, and (5) in accordance with a judicial order executes a convict sentenced to death by a court of competent jurisdiction. Further, killing an alien enemy in time of war *and* in the actual exercise of war is justifiable; if the killing is not in the actual exercise of war, the homicide may be either murder or manslaughter. Clark & Marshall, *supra* at 534 n.3.

³ "Sir Edward Coke said that anciently excusable homicide was punished by death; but this is probably not true. It was certainly punished, however, by forfeiture of goods and chattels. Now it is no longer punished at all, either in England or in the United States." Clark & Marshall, *supra* note 2, at 416.

⁴ Miller on Criminal Law 256 (1934).

⁵ See arts. 1207-29, Tex. Pen. Code Ann. (1948). An accidental killing while in the pursuit of some lawful objective is still treated under the heading of excusable homicide. Tex. Pen. Code Ann. art. 1228 (1948); *Hobbs v. State*, 68 Tex. Crim. Rep. 593, 151 S.W. 809 (1912) (If a person acting in his own necessary self-defense shoots and kills a third person by accident, he is guilty of no offense.).

⁶ The following provisions on justifiable homicide are self-explanatory and will be omitted from discussion in the text:

It is lawful to kill a public enemy, not only in the prosecution of war, but when he may be in the act of hostile invasion or occupation of any part of the State. A public enemy is any person acting under the authority or enlisted in the service of any government at war with this State or with the United States. Homicide of a public enemy by poison or by the use of poisoned weapons is not justifiable. Homicide of a public enemy who is a deserter or prisoner of war or the bearer of a flag of truce is not justifiable. Tex. Pen. Code Ann. art. 1208 (1948).

The execution of a convict for a capital offense by a legally qualified officer under the warrant of a court of competent jurisdiction is justifiable when the same takes

I. ADULTERY

A. *Common-law and Majority View*

At common law adultery did not justify homicide.⁷ So in England, as in most American states, the courts, adhering to the common law, hold that the killing by the husband of the wife or her paramour is punishable as murder,⁸ but may be reduced to manslaughter if the husband acts in a heat of passion brought about by suddenly-acquired knowledge of the adulterous act.⁹ There is authority that the same mitigating effect is given to the wife if she kills her husband's mistress.¹⁰

B. *Texas Law*

Article 1220 of the Texas Penal Code provides:

Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing takes place before the parties to the act have separated. Such circumstances cannot justify a homicide where it appears that there has been, on the part of the husband, any connivance in or assent to the adulterous connection.¹¹

It is readily apparent that the Texas statute, even if strictly construed, represents a departure from the common-law rule; *i.e.*, not only is the homicide justifiable, but it need not be committed while in the heat of passion. However, if the motive for the homicide is other than the adulterous connection, the slayer is not entitled to a charge under article 1220, and if there has been connivance or assent by the husband to the adulterous act the homicide is not justifiable.¹²

The broad protection offered the irate husband¹³ is expanded still further by the liberal construction given certain particulars of article 1220. Our statute uses the expression "taken in the act of

place in the manner authorized by law and directed by warrant. Tex. Pen. Code Ann. art. 1209 (1948).

Homicide is justifiable when necessary to suppress a riot when the same is attempted to be suppressed in the manner pointed out in the Code of Criminal Procedure [see articles 95 - 103], and can in no way be suppressed except by taking life. Tex. Pen. Code Ann. art. 1219 (1948).

⁷ Stumberg, *Defense of Person and Property Under Texas Criminal Law*, 21 Texas L. Rev. 17, 18 (1942).

⁸ Stumberg, *supra* note 7, at 18.

⁹ *Ibid.* It has been held that sight of the wife in the act of adultery is sufficient provocation to reduce to manslaughter an instant killing of the wife or the paramour. According to the old authorities the husband *must* see the act; for if he killed on suspicion, however well founded, or on information, he was guilty of murder. This is no longer true. See Clark & Marshall, *supra* note 2, at 626-27.

¹⁰ See *Hughey v. State*, 106 So. 361 (Miss. 1925).

¹¹ Tex. Pen. Code Ann. (1948).

¹² See *Burton v. State*, 129 Tex. Crim. Rep. 234, 86 S.W.2d 768 (1935).

¹³ The fact that the husband and wife are separated, but not divorced, should not restrict the privilege extended to him under article 1220.

adultery."¹⁴ It would seem that this phrase requires that the husband have actual knowledge of the act, but it has been held that such knowledge is unnecessary;¹⁵ it is only necessary that the surrounding circumstances would indicate to a rational mind that the adulterous act has *just then* been committed, or was about to be committed.¹⁶ In the event of a mistake, the husband's guilt depends upon the reasonableness of the appearance, judged from his own standpoint.¹⁷ The statute also uses the phrase "before the parties . . . have separated." This has been interpreted to mean only that the parties are still in each other's company, not that they are still united in the act of copulation.¹⁸

There appears to be no sound basis for the broad protection afforded the husband by article 1220. The common-law rule has been explained on the basis that allowances should be made for normal frailties of human nature.¹⁹ However, this explanation does not elucidate the Texas statute, which apparently finds its basis in the code of the old west.

The inconsistency of the Texas rule is illustrated by the fact that, while the husband may justifiably kill his wife's paramour,²⁰ he may not intentionally take his wife's life,²¹ nor may he inflict serious bodily injury (mutilation) upon the paramour without an intent to kill.²² Further, the wife is not justified in taking the life of her husband's mistress,²³ nor the life of her husband,²⁴ although evidence of the illicit relationship may be considered by the jury in determining whether

¹⁴ The word "adultery," as used by the statute, does not have the same meaning as the statutory offense of adultery which requires the living together and carnal intercourse with each other, or habitual carnal intercourse with each other. Proof of ecclesiastical adultery is all that is required, i.e., violation of the marriage bed, whether the parties lived in habitual carnal intercourse or not. See *Price v. State*, 18 Tex. App. 474 (Tex. Ct. App. 1885).

¹⁵ *Price v. State*, supra note 14.

¹⁶ *Tarrant v. State*, 114 Tex. Crim. Rep. 436, 25 S.W.2d 836 (1930); *Williams v. State*, 73 Tex. Crim. Rep. 480, 165 S.W. 583 (1914); *Oliver v. State*, 70 Tex. Crim. Rep. 140, 159 S.W. 235 (1913); *Gregory v. State*, 50 Tex. Crim. Rep. 173, 94 S.W. 1041 (1906).

¹⁷ *Gregory v. State*, supra note 16; *Price v. State*, supra note 14.

¹⁸ *Price v. State*, supra note 14.

¹⁹ *Stumberg*, supra note 7, at 18.

²⁰ If the husband discovered the paramour in the act of adultery with his wife, and made a murderous assault or dangerous attack upon him to avenge the wrong, and in resisting which the paramour took the life of the husband, the paramour would be guilty of murder without malice, because he was committing a misdemeanor which was the cause of and brought about the necessity for the homicide. *Reed v. State*, 11 Tex. App. 509 (Tex. Ct. App. 1882).

²¹ *Steadham v. State*, 119 Tex. Crim. Rep. 475, 43 S.W.2d 944 (1931); *Billings v. State*, 102 Tex. Crim. Rep. 338, 277 S.W. 687 (1925) (The adulterous relationship may be used as evidence to reduce the killing from murder with malice to murder without malice.).

²² *Sensobough v. State*, 92 Tex. Crim. Rep. 417, 244 S.W. 379 (1922).

²³ Cf. *Barr v. State*, 146 Tex. Crim. Rep. 178, 172 S.W.2d 322 (1943); *Reed v. State*, 123 Tex. Crim. Rep. 348, 59 S.W.2d 122 (1933).

²⁴ See *Reed v. State*, supra note 23.

the killing was with or without malice.²⁵ The explanation offered by the courts for these cases is that there is no inherent right to kill another for any purpose, and regulation of the right to kill is a matter with which the legislature, not the courts, is primarily concerned.²⁶ While this rationale satisfactorily explains situations not encompassed by the statute, it does not explain the statute itself.

II. HOMICIDE BY ARRESTING OFFICERS

A. *Common-law View*

At common law the distinction that was most often made in questions of killings by arresting officers was whether the crime for which the accused was sought to be arrested was a felony or a misdemeanor.²⁷ If the act for which the arrest was sought to be made was a felony, the law would justify an officer's killing the culprit if he could not otherwise be arrested.²⁸ This rule permitted a homicide in order to check or prevent flight before actual arrest,²⁹ to repel actual physical resistance,³⁰ to prevent escape or rescue after arrest,³¹ and to recapture after escape.³² It was necessary, however, that a felony had in fact been committed; if the officer acted on mere suspicion, he did so at his peril.³³

The amount of force which the officer was privileged to use was limited to that which was necessary or apparently necessary to the proper accomplishment of the arrest.³⁴ This liberal privilege to kill was justified on the basis that, at common law, a felon was subject to the death penalty upon conviction, and, therefore, no harm was done by his premature execution by the arresting officer.³⁵ The patent fallacy in this rule lay in the fact that the arresting officer was often both the judge and executioner of the suspect.³⁶

Where the offense was a misdemeanor, the life of the wrongdoer

²⁵ *Barr v. State*, supra note 23.

²⁶ *Billings v. State*, supra note 21.

²⁷ Comment, 30 *Texas L. Rev.* 608 (1952).

²⁸ A minority of jurisdictions in this country have extended this rule to justify a homicide by an officer committed in pursuit of a lawful arrest of one who has committed a misdemeanor. *Clark & Marshall*, supra note 2, at 420. See *United States v. Clark*, 31 Fed. 710 (C.C.E.D. Mich. 1887); *Brooks v. Commonwealth*, 61 Pa. 352 (1869).

²⁹ *Jackson v. State*, 66 Miss. 89, 5 So. 690 (1888).

³⁰ *State v. Sigman*, 106 N.C. 728, 11 S.E. 520 (1890).

³¹ *Thomas v. Kinkead*, 55 Ark. 502, 18 S.W. 854 (1892).

³² *State v. Sigman*, supra note 30.

³³ *Clark & Marshall*, supra note 2, at 420.

³⁴ *Clark & Marshall*, supra note 2, at 419. See *People v. Brooks*, 131 Cal. 311, 63 Pac. 464 (1901).

³⁵ Comment, supra note 27, at 608-09.

³⁶ *Id.* at 609.

was given greater regard by the majority view.³⁷ While the officer making a lawful arrest could use any necessary force short of taking life, he could not take the culprit's life except to save his own life or to prevent great bodily harm to himself.³⁸

B. Texas Law

The Texas law, unlike the common law, has never justified an officer's³⁹ taking the life of a person sought to be arrested⁴⁰ merely on the basis of the seriousness of the supposed offense.⁴¹ Thus, in absence of resistance on the part of the accused which puts the officer in fear of his life or great bodily injury, the officer has no right by virtue of his position to take the accused's life.⁴²

³⁷ Clark & Marshall, *supra* note 2, at 418; cf. *United States v. Clark*, *supra* note 28.

³⁸ Clark & Marshall, *supra* note 2, at 419; cf. *Dilger v. Commonwealth*, 88 Ky. 550, 11 S.W. 651 (1889).

³⁹ The term "officer" includes militiamen, *Manley v. State*, 62 Tex. Crim. Rep. 392, 137 S.W. 1137 (1911), posse members, *Weatherford v. State*, 31 Tex. Crim. Rep. 530, 21 S.W. 251 (1893), and federal officers, Tex. Pen. Code Ann. art. 1218 (1948). Further, the protection afforded an "officer" is extended to persons called in the aid of an officer. Tex. Pen. Code Ann. art. 1216 (1948).

⁴⁰ All persons opposing the execution of the order of the magistrate or court, or aiding in the accused's escape, may be treated in the same manner by the officer as the person against whom the order is directed or who is attempting to escape. Tex. Pen. Code Ann. art. 1217 (1948).

⁴¹ While the cases herein are concerned with homicide incident to an arrest, the statute is sufficiently broad to include a homicide committed in the execution of lawful orders other than arrests, e.g., an officer or sheriff ordered to seize chattels incident to enforcement of a judgement. See Tex. Pen. Code Ann. art. 1214 (1948). See also *Rainey v. State*, 20 Tex. Crim. Rep. 455 (1886).

⁴² Tex. Pen. Code Ann. art. 1210 (1948) provides: "Homicide by an officer in the execution of lawful orders of magistrates and courts is justifiable when he is violently resisted and has just grounds to fear danger to his own life in executing the order." See *Caldwell v. State*, 41 Tex. 86 (1874), where it was held that the officer or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape, but he shall not in any case kill one who attempts to escape, unless in preventing the escape or the attempt to escape the life of the officer is endangered or he is threatened with great bodily injury.

Tex. Pen. Code Ann. art. 1212 (1948) qualifies article 1210 in the following particulars:

1. The order must be that of a magistrate or a court having lawful authority to issue it.
2. It must have such form as the law requires to give it validity.
3. The person executing the order must be some officer duly authorized by law to execute the order, or some person especially appointed in accordance with law for the performance of the duty.
4. If the person executing the order be an officer and performing a duty which no other person can by law perform, he must have taken the oath of office and given bond, where such is required by law.
5. The order must be executed in the manner directed by law, and the person executing the same must make known his purpose and the capacity in which he acts.
6. If the order be a written one, and the person against whom it issues, before resistance offered, wishes to see the same or hear it read the person charged with its execution shall produce the order and show it or read it.
7. In making an arrest under a written order, the person acting under such order shall, in all cases, declare to the party against whom it is directed the offense of which

Article 1212(10) provides the one instance where an officer may justifiably kill when the homicide is not in defense of his person.

A prisoner under sentence of death or of imprisonment in the penitentiary or attempting to escape from the penitentiary may be killed by the person having legal custody of him, if his escape can in no other manner be prevented.⁴³

This statutory provision has, however, received a rather strict interpretation, and has been held to be inapplicable where a guard is attempting to *recapture* an escaped penitentiary convict.⁴⁴

Aside from the limited right secured under article 1212(10), the officer has no greater rights than the ordinary citizen,⁴⁵ although the officer's right to arrest in the first instance is broader than that of the ordinary citizen.⁴⁶ The courts have consistently stated that the right to arrest does not include the right to kill.⁴⁷ Moreover, if the arrest is illegal,⁴⁸ except when the illegality is due to an error of judgment on the part of the magistrate or court ordering the arrest,⁴⁹

he is accused, and state the nature of the warrant, unless prevented therefrom by the act of the party to be arrested.

8. The officer or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape when it is attempted, but he shall not in any case kill one who attempts to escape, unless in making or attempting such escape the life of the officer is endangered, or he is threatened with great bodily injury.

9. In overcoming a resistance to the execution of an order, the officer or person executing the same may oppose such force as is necessary to overcome the resistance, but he shall not take the life of the person resisting unless he has just ground to fear that his own life will be taken or that he will suffer great bodily injury in the execution of the order.

⁴³ Tex. Pen. Code Ann. (1948).

⁴⁴ *Wright v. State*, 44 Tex. 645 (1875) (In such a case the guard has only the authority of a peace officer.).

⁴⁵ Cf. *Caldwell v. State*, supra note 42. The ordinary citizen has the right to kill *in self-defense* as incident to a lawful arrest. See *Rutland v. State*, 88 Tex. Crim. Rep. 114, 224 S.W. 1088 (1920).

⁴⁶ See article 215 of the Texas Code of Criminal Procedure which provides:

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

However, Tex. Code Crim. Proc. Ann. art. 212 (1954) provides:

A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an "offense against the public peace." (Emphasis added.)

⁴⁷ *McDonald v. State*, 119 Tex. Crim. Rep. 39, 22 S.W.2d 670 (1929).

⁴⁸ An arrest *with* a warrant is illegal unless there is a compliance with the provisions of article 1212 of the Penal Code. An arrest *without* a warrant is illegal unless there is compliance with article 212 or 215 (depending on which is applicable) of the Code of Criminal Procedure. See articles 212, 215, supra note 46.

⁴⁹ Tex. Pen. Code Ann. art. 1211 (1948). The error of judgment of the magistrate mentioned in article 1211 should be distinguished from errors in form. See Tex. Pen. Code Ann. art. 1212(2) (1948). The order of the magistrate may be either written or verbal, where a verbal order is allowed for the arrest of a person. Tex. Pen. Code Ann. art. 1213 (1948). Article 37 of the Penal Code provides that a person in the lawful execution of a written process or verbal order from a court or magistrate is justified in any act done in obedience

the officer loses his right of perfect self-defense,⁵⁰ and the person subjected to the illegal arrest may justifiably use such force as appears to him to be necessary to prevent the unlawful arrest.⁵¹

To the casual reader, the provisions of the Penal Code, primarily concerned with justifiable homicide by police officers,⁵² may appear unduly restrictive. In effect, however, the Texas law follows the pattern of the common law because, in addition to the rights secured to a police officer under articles 1210 through 1218, article 1222 justifies homicide committed to prevent the more serious felonies;⁵³ in such cases the officer need not act defensively, but may take the initiative.

While Texas law does not extend to the officer the privilege to kill a culprit merely because he is fleeing⁵⁴ (except as specifically provided in article 1222⁵⁵) or to kill merely while attempting to re-arrest,⁵⁶ it is thought that such restrictions are preferable to the common-law rule which substituted the verdict of the officer for that of the jury.⁵⁷

thereto; moreover, a peace officer is in like manner justified in any act which he is bound by law to perform without warrant or verbal order. However, no officer or other person ordered verbally to arrest another is justified in killing except the arrest be in a case of felony or for the prevention of a felony. Tex. Pen. Code Ann. art. 1215 (1948).

⁵⁰ An officer who kills in self-defense in effecting an illegal arrest is guilty of murder without malice because of the doctrine of imperfect self-defense. See *Carter v. State*, 30 Tex. App. 551, 17 S.W. 102 (1891). This doctrine is based upon the principle that a homicide necessary to prevent death or serious bodily injury, but which stems from the commission of a misdemeanor (e.g., false imprisonment), constitutes murder without malice. *Reed v. State*, supra note 23.

⁵¹ *Grafft v. State*, 134 Tex. Crim. Rep. 30, 113 S.W.2d 546 (1938): Where the deceased was killed while effecting an illegal arrest, the court held that it was error for the trial court to charge that the killing was justifiable only if the slayer was in fear for his life or serious bodily injury, for if the arrest was illegal, the accused may use such force as reasonably appears necessary to prevent such arrest or to free himself. "We think that the better plan is for the court to instruct the jury on his right of self-defense and his right to resist an illegal arrest in separate and distinct paragraphs. . . . An accused person is entitled to a distinct and affirmative instruction upon the law of every defensive issue raised by the evidence." 113 S.W.2d at 547. See *Mitchell v. State*, 135 Tex. Crim. Rep. 176, 117 S.W.2d 433 (1938); *Fagon v. State*, 112 Tex. Crim. Rep. 107, 14 S.W.2d 838 (1929). But see *Condron v. State*, 69 Tex. Crim. Rep. 513, 155 S.W. 253 (1913).

⁵² Tex. Pen. Code Ann. arts. 1210-18 (1948).

⁵³ Article 1222 provides that homicide by any person is justifiable when inflicted for the purpose of preventing murder, rape, robbery, maiming, disfiguring, castration, arson, burglary, or theft at night. Tex. Pen. Code Ann. (1948). See, e.g., *Barnes v. State*, 134 Tex. Crim. Rep. 461, 116 S.W.2d 408 (1938).

⁵⁴ Tex. Pen. Code Ann. art. 1210 (1948).

⁵⁵ Tex. Pen. Code Ann. art. 1222 (1948) provides that: (1) a robber may be killed while fleeing with the property taken; (2) in the case of arson the homicide may be inflicted while the arsonist is fleeing from the place or building before its destruction; and (3) in cases of burglary and theft by night, the homicide is justifiable at any time while the offender is within gunshot range of such place or building.

⁵⁶ See Tex. Pen. Code Ann. art. 1210 (1948).

⁵⁷ The privilege to kill did not depend upon any subsequent proof that the person killed had committed a felony. It was enough if the officer had reasonable grounds to suspect that one fleeing had committed a felony even though none had in fact been committed. *Hall, Legal and Social Aspects of Arrest Without a Warrant*, 49 Harv. L. Rev. 566, 570 (1936).

III. DEFENSE OF PERSON

A. *Common-law View*1. *Prevention of Felonies*

It was well settled at common law that any person, whether he was a peace officer or merely a private individual, might kill if necessary to prevent a felony—if the felony was attempted by force or surprise,⁵⁸ e.g., murder.

2. *Self-defense*

Aside from the right to kill in order to prevent a felony by force or surprise, the common law also justified (or excused) a homicide in self-defense when effected to prevent the infliction of serious bodily injury or death. If the original attack was of a felonious nature, the person threatened, being without fault himself, might stand his ground and justifiably kill the assailant.⁵⁹ If a person was assaulted, but not in such a way as to endanger his life or threaten serious bodily injury, he might oppose force with force, and if in the conflict which ensued, the attacker threatened to kill or inflict serious bodily injury, the party originally attacked might, after retreating as far as safety would permit, kill; in such case the killing was considered excusable.⁶⁰ However, homicide was neither justifiable or excusable on the grounds of self-defense unless it was apparently necessary for the slayer to save his own life or to save himself from serious bodily harm.⁶¹ The apprehension of danger other than loss of life or serious bodily harm was insufficient either to justify or to excuse the homicide.⁶²

3. *Defense of Others*

At common law only a close relative could intervene in defense of another except where the killing was to prevent a felony.⁶³ Further, the intervenor acted at his peril since his right to defend another was coextensive with the right of the person he defended.⁶⁴

B. *Texas Law*1. *Prevention of Felonies*

Article 1222 of the Penal Code justifies a killing to prevent mur-

Thus, an officer, acting as prosecutor, judge, and jury, had broader powers than the trial jury who could only convict if they found the defendant guilty beyond a reasonable doubt.

⁵⁸ Clark & Marshall, *supra* note 2, at 423.

⁵⁹ *Id.* at 415.

⁶⁰ *Id.* at 426.

⁶¹ *Allen v. United States*, 164 U.S. 492 (1896).

⁶² *Ibid.*

⁶³ *Campbell v. Commonwealth*, 88 Ky. 402, 11 S.W. 290 (1889).

⁶⁴ *Moore v. State*, 250 Okla. Crim. Rep. 118, 218 Pac. 1102 (1923).

der, rape, maiming, disfiguring, castration, and certain other crimes relating to property.⁶⁵ This article is applicable in situations where it appears by acts or words coupled with acts that it was the intention of the assailant to commit one of the enumerated crimes.⁶⁶ The felonious intent will be presumed if the weapon used is calculated to produce murder, maiming, disfiguration, or castration.⁶⁷ However, if the slayer acts with malice, not to prevent one of the enumerated offenses, he has committed murder even though the person killed was actually committing one of the enumerated offenses.⁶⁸ If he kills to prevent an offense other than those enumerated in article 1222, his only possible defense would be under article 1224 relating to "defense against milder attacks."⁶⁹

Under article 1222 (2), the killing must take place while the person killed was in the very act of committing the offense, or after some act by him showing an intent to commit one of the enumerated crimes.⁷⁰ While articles 1222 (2)-(3) require that the homicide take place while the offender is committing the offense and before the offense is actually completed, this general rule is qualified considerably by other provisions of article 1222; *viz.*, (1) in the case of rape, the ravisher may be killed at any time before he has escaped from the presence of his victim;⁷¹ (2) where the killing takes place to prevent the murder of some other person, the murderer may be killed so long as he is still inflicting violence, though the mortal wound may have been given;⁷² and (3) in the cases of maiming, disfiguring, or castration, the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense.⁷³

In the event that the slayer can bring himself under the protective mantle of article 1222, as opposed to the statutory provisions pertain-

⁶⁵ Tex. Pen. Code Ann. (1948). Article 1222 also provides that a homicide is justified "when inflicted upon a person or persons who are found armed with deadly weapons and in disguise in the night time on premises not his or their own," provided that "the party slain in disguise is engaged in any attempt by word, gesture or otherwise to alarm some other person or persons and put them in bodily fear."

⁶⁶ Tex. Pen. Code Ann. art. 1222(1) (1948); see dissenting opinion in *Hunnicut v. State*, 20 Tex. Crim. Rep. 632 (1886).

⁶⁷ Tex. Pen. Code Ann. art. 1223 (1948). When the case involves a homicide to prevent murder and the weapon employed is not per se deadly, its deadly character in connection with its use would be for the jury to decide; once the jury finds the weapon is deadly, intention to commit murder is presumed. See *Beckham v. State*, 135 Tex. Crim. Rep. 338, 120 S.W.2d 97 (1938).

⁶⁸ *Alsop v. State*, 120 Tex. Crim. Rep. 310, 49 S.W.2d 749 (1932).

⁶⁹ But see discussion as to article 1226 at pp. 517-20 *infra*.

⁷⁰ Tex. Pen. Code Ann. (1948).

⁷¹ Tex. Pen. Code Ann. art. 1222(3) (1948).

⁷² Tex. Pen. Code Ann. art. 1222(4) (1948).

⁷³ Tex. Pen. Code Ann. art. 1222(6) (1948).

ing to self-defense, it not necessary that he resort to all other reasonable means for the prevention of the crime, but he may act instantly.⁷⁴

2. *Self-defense: Defense Against Milder Attacks*

While article 1222 justifies homicide against a *felonious* attack by the party attacked or by a third party who intervenes, the Texas statute concerned with defense of the person against an unlawful, *but non-felonious*, attack is article 1224:

Homicide is justifiable also in the protection of the person . . . against any other unlawful and violent attack besides those mentioned [see article 1222], and in such cases all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack. . . .⁷⁵

The reader will note that this provision uses the phrase "any other unlawful attack." It is over the interpretation of this phrase that the writers and the courts disagree. Professor Stumberg insists that the correct interpretation of the phrase "any other unlawful attack" is that the attack, while not manifesting an intent to commit murder, rape, maiming, disfiguring, creates in the mind of the person attacked a reasonable apprehension that death or serious bodily injury will ensue if the attack is allowed to persist.⁷⁶ In support of this interpretation Professor Stumberg relies upon the language of article 1226, which provides:

The attack upon the person of an individual in order to justify homicide must be such as produces a reasonable expectation or fear of death or some serious bodily injury.⁷⁷

Certainly, if the legislature intended article 1226 to qualify the broad language of article 1224, Professor Stumberg's argument is unimpeachable.⁷⁸

⁷⁴ See *Holland v. State*, 124 Tex. Crim. Rep. 348, 61 S.W.2d 838 (1933); see dissent in *Hunnicuttt v. State*, supra note 66.

⁷⁵ Tex. Pen. Code Ann. (1948). If the defendant provokes the difficulty which leads to a killing, but without intending to bring about a situation in which he may kill or inflict serious bodily injury, the jury cannot inflict a penalty of more than two to five years due to the operation of the Texas imperfect self-defense rule. *Crowley v. State*, 117 Tex. Crim. Rep. 372, 35 S.W.2d 437 (1930). This should not be confused with the right to kill under 1224 which presupposes that the slayer is without fault.

⁷⁶ Stumberg, supra note 7, at 25-27.

⁷⁷ Tex. Pen. Code Ann. (1948).

⁷⁸ See Stumberg, *Texas Cases on Criminal Law* 178 (1954):

While article 1226 of the Penal Code does provide that the attack by the deceased must be such as to produce a reasonable expectation or fear of death or serious bodily injury, it does not create the privileges arising out of articles 1222, 1223 and 1224. Its apparent purpose is to modify article 1224 which deals with self-defense

Several of the older cases have refused to justify a homicide when committed in defense against a non-felonious attack.⁷⁹ Although these cases have not been expressly overruled, the more recent cases have consistently held that such a homicide is justifiable, and, further, that the attack need not be such as to produce a reasonable apprehension of death or serious bodily injury.⁸⁰ The position taken by the court in these cases is that any unlawful attack, even those of a non-felonious nature, will justify homicide so long as the person attacked resorts to all other reasonable means, save retreat,⁸¹ to repel the attack, and the homicide occurs while the person killed is in the very act of making such unlawful attack.⁸² Obviously, the court does not believe that the legislature intended article 1226 to limit article 1224. Thus it seems that the courts have taken the position that the purpose of article 1226 is to bestow a privilege to kill in addition to the privileges bestowed by articles 1222 and 1224. While the court has never expressly stated this to be so, an analysis of the cases leads to no other reasonable conclusion.

In *Bertrand v. State*,⁸³ the defendant, charged with murder, defended on the ground of self-defense. The facts indicated that deceased, who was many years younger and much larger than defendant, attacked defendant with his fists, landing as many as two blows before defendant shot him. The court instructed the jury that if it reasonably appeared to defendant that he was in peril of death or serious bodily injury, he would be justified in taking his assailant's life, but only after he had resorted to all other reasonable means to repel the attack. On appeal defendant's conviction was reversed because the court's charge was erroneous. The court held that if the attack was such as to create an apprehension of death or serious bodily injury in the mind of the accused, he did not have to resort to other means to repel the attack or prevent the injury; *i.e.*, article 1224 would be inapplicable. However, if the accused resorted to all other reasonable means to repel the attack, his actions would be justified irrespective

apart from article 1222. This latter article authorizes a person to kill to prevent certain enumerated crimes but not to kill merely because of a reasonable apprehension of death or serious bodily injury.

⁷⁹ *Smith v. State*, 80 Tex. Crim. Rep. 221, 189 S.W. 484 (1916); see *McGrew v. State*, 31 Tex. Crim. Rep. 339, 49 S.W. 226 (1899).

⁸⁰ *Cloudy v. State*, 142 Tex. Crim. Rep. 211, 152 S.W.2d 363 (1941); see *Bertrand v. State*, 154 Tex. Crim. Rep. 280, 234 S.W.2d 244 (1950).

⁸¹ Tex. Pen. Code Ann. art. 1225 (1948). Compare the common-law view as to retreat on p. 515 *supra*.

⁸² *Holland v. State*, 124 Tex. Crim. Rep. 348, 61 S.W.2d 838 (1933); *Stroud v. State*, 113 Tex. Crim. Rep. 621, 24 S.W.2d 52 (1929).

⁸³ 155 Tex. Crim. Rep. 280, 234 S.W.2d 244 (1950); see Note, 29 Texas L. Rev. 960 (1951).

of whether the attack was of such a nature as to create in his mind an apprehension of death or serious bodily injury; *i.e.*, article 1224 would be applicable. While the court did not expressly state that it was relying upon article 1226, a reasonable interpretation of the case leads to that conclusion. The only justification offered to a slayer who kills without to resort to other means is found in article 1222, which justifies homicide for the prevention of murder, rape, maiming, disfiguring, castration, and certain other offenses relating to property. However, this provision is applicable in the case of self-defense *only* where it reasonably appears by the decedent's acts or words coupled with acts that it was his *purpose* and *intent* to commit one of the enumerated offenses,⁸⁴ or where the killing takes place while the decedent was in the very act of committing such offense.⁸⁵ In the *Bertrand* case no contention was made nor was there any objective manifestation on the deceased's part which would indicate that it was his purpose and intent to murder, maim, or castrate the defendant. Hence, it would seem that the court was not relying upon article 1222 for its holding. Therefore, by process of elimination, the only explanation for the decision would be that article 1226 was being interpreted as bestowing a privilege to kill in addition to the privileges bestowed by articles 1222 and 1224.

The writer believes that the court's interpretation of article 1226 is insupportable. In the first instance the plain meaning of its language is that of a limiting article. The phrasing of the statute is that "[t]he attack upon the person of an individual in order to justify homicide must be such as produces a reasonable expectation or fear of death or some serious bodily injury." Obviously, the legislature was referring to *any* attack, which of course would qualify the phrase "unlawful and violent attack" used in article 1224. Secondly, what appears to be the obvious import of article 1226 is in accord with the common-law rule that apprehension of bodily injury, not serious or deadly in nature, would not justify a homicide. Thirdly, and most persuasive, is the fact that in both articles 1222 and 1224 the legislature was quite explicit as to when these articles were applicable, *viz.*, article 1224 is applicable only when the attack is in progress and the slayer resorts to all other reasonable means, and article 1222 is divided into nine separate sections explaining when it is applicable. On the other hand, article 1226 is devoid of any expressions that would indicate when it becomes applicable. It seems unlikely that the legislature would be so exacting in articles 1222 and 1224 and not in

⁸⁴ Tex. Pen. Code Ann. art. 1222(1) (1948).

⁸⁵ Tex. Pen. Code Ann. art. 1222(2) (1948).

article 1226, if the latter was intended to create an additional privilege to kill.

In the final analysis, it appears that the courts have exceeded the bounds of legislative intent. The ironic note of this is that in one of the few instances where the legislature apparently chose to echo the common law, the court did not feel so disposed.

3. *Defense of Others*

Under the Texas law, as contrasted with the common law, the intervenor need not be related to the person whom he defends.⁸⁶ In Texas, "the same rules which regulate the conduct of the person about to be injured, in repelling the aggressor, are also applicable to the conduct of him who interferes in behalf of such person."⁸⁷ However, the Texas law does not place the restriction upon the intervenor that his conduct is justified only if the defended person himself would have been justified in taking his assailant's life.⁸⁸ Thus, if it reasonably appears to the intervenor that a person is being subjected to an unlawful, but non-felonious, attack (through no fault of his own), the intervenor under article 1224 may justifiably take the assailant's life provided he resorts to all other reasonable means to repel the unlawful attack, and the killing takes place while the assailant is in the very act of making such unlawful attack.⁸⁹ However, if it reasonably appears to the intervenor that the person being attacked, through no fault of his own, is about to sustain death or serious bodily injury from such attack, apparently the intervenor may justifiably take the assailant's life without resort to other means to prevent the injury or repel the attack.⁹⁰

Of course, there is no question but that the intervenor may justifiably kill under article 1222, if the killing is for the purpose of preventing one of the felonies enumerated therein. This should be distinguished from the situation where it was the intervenor's intent and purpose to protect the third person from an attack, rather than to prevent one of the offenses enumerated in article 1222.

⁸⁶ *Batchan v. State*, 104 Tex. Crim. Rep. 228, 283 S.W. 507 (1926).

⁸⁷ Tex. Code Crim. Proc. Ann. art. 71 (1954).

⁸⁸ The law in Texas is that the culpability of one who acts in defense of another is measured by the intent with which he acted, and not by the intent of the other, or the party for whom he was acting, unless he knew or might reasonably have known the intent of the other party. *Mayhew v. State*, 65 Tex. Crim. Rep. 290, 144 S.W. 229 (1912).

⁸⁹ Tex. Pen. Code Ann. art. 1224 (1948); see *Witty v. State*, 150 Tex. Crim. Rep. 555, 203 S.W.2d 212 (1947); cf. *Cloudy v. State*, supra note 80.

⁹⁰ Tex. Pen. Code Ann. art. 1226 (1948); see *Bertrand v. State*, supra note 80; *Mayhew v. State*, supra note 88. See pp. 519-20 supra of this Comment wherein this result has been criticized as not the correct interpretation of article 1226.

IV. DEFENSE OF PROPERTY

A. *Common-law View*

The common-law view is that one cannot justifiably kill a person merely in defense of property.⁹¹

The preservation of human life, and of limb and member from grievous harm is of more importance to society than the protection of property. . . .⁹²

This was so even though the property protected was the home of the slayer.⁹³ It has often been stated, however, that one may oppose force with force, even to the extent of taking a life, if necessary, in defense of his property against one who manifestly endeavors by violence to commit a felony such as arson or burglary.⁹⁴ The true analysis of such a situation is that the actual privilege being exercised is that of preventing a dangerous felony which may, as an incidental result, prevent the loss of property.⁹⁵

B. *Texas Law*1. *Prevention of Felonies*

As in the case with the other statutory provisions on justifiable homicide, the Texas statute on defense of property far exceeds its common-law counterpart.

However Article 1222 makes a homicide justifiable when inflicted for the purpose of preventing robbery, arson, burglary, and theft at night,⁹⁶ limited by the requirement that the slayer act on reasonable belief that it was the intent of the deceased to commit one of the enumerated felonies.⁹⁷ If, however, the killing was done with malice and not to prevent one of the enumerated crimes, the slayer's conduct is not justified, even though the person killed was actually committing one of the offenses enumerated under article 1222.⁹⁸

Although article 1222 does not extend the privilege to kill beyond the completed act,⁹⁹ in the case of burglary, arson, theft at night, and robbery the privilege to kill endures for some time after the con-

⁹¹ Stumberg, *supra* note 7, at 20.

⁹² *Stimpson v. State*, 59 Ala. 1, 14 (1877).

⁹³ Stumberg, *supra* note 7, at 193.

⁹⁴ See *State v. Nyland*, 47 Wash.2d 240, 287 P.2d 345 (1955).

⁹⁵ Perkins On Criminal Law 917 (1957).

⁹⁶ Night time is anytime between thirty minutes after sunset and thirty minutes before sunrise. *Laws v. State*, 10 S.W. 220 (Tex. Ct. App. 1888).

⁹⁷ Tex. Pen. Code Ann. (1948); *Henry v. State*, 136 Tex. Crim. Rep. 22, 123 S.W.2d 347 (1938); *Johnson v. State*, 135 Tex. Crim. Rep. 248, 117 S.W.2d 1100 (1938).

⁹⁸ *Alsup v. State*, *supra* note 68. *Laws v. State*, *supra* note 96.

⁹⁹ Tex. Pen. Code Ann. art. 1222 (2) (1948).

summation of the offense. In the case of burglary and theft at night the homicide is justifiable so long as the culprit is within gunshot range of the building or the place of the theft.¹⁰⁰ In the case of robbery, it endures as long as the robber is fleeing with the property taken,¹⁰¹ while in the case of arson, the homicide may be inflicted as long as the offender is in or at the building or fleeing from it before its destruction.¹⁰²

This privilege to kill after the consummation of one of the enumerated offenses has resulted in several alarming decisions. In *Whitten v. State*,¹⁰³ the deceased was discovered in unlawful possession of a horse at night. Upon being discovered the culprit abandoned the property; nevertheless the owner shot him five times. The trial court charged the jury that the homicide would not be justified if at the time of the killing the deceased had abandoned his intention to commit theft. On appeal the court reversed the conviction stating:

Under our law it makes no difference whether the party has abandoned the property and is fleeing from the place of the theft; if he be shot while he is still within reach of gunshot from that place, the homicide is justifiable.¹⁰⁴

The *Whitten* case, although literally correct, exemplifies the tragic results which flow from the language of article 1222.

2. Prevention of Non-felonious Attacks

In the event that the killing does not take place to prevent one of the felonies enumerated in article 1222, a homicide committed in the protection of one's property may be justified by the terms of article 1224 under the same circumstances as is a killing in defense of the person; *i.e.*, if other means have first been resorted to for the prevention of the injury to the property and the deceased is in the very act of making an unlawful and violent attack upon the property, the homicide is justified.¹⁰⁵ However, article 1224, insofar as it justifies homicide for the protection of property, is limited by article 1227, which requires the slayer to be in actual, lawful possession of

¹⁰⁰ Tex. Pen. Code Ann. art. 1222(8) (1948).

¹⁰¹ Tex. Pen. Code Ann. art. 1222(5) (1948).

¹⁰² Tex. Pen. Code Ann. art. 1222(7) (1948).

¹⁰³ *Whitten v. State*, 29 Tex. Crim. Rep. 504, 16 S.W. 296 (1891).

¹⁰⁴ *Id.* at 298.

¹⁰⁵ *Cloudy v. State*, *supra* note 80. The right to defend property is not dependent upon the fact that the attack upon the property is or is not accompanied by violence upon the person. It is only where a third person intervenes in behalf of one whose property or person is assailed that the killing of the aggressor by such third person will not be justifiable "unless the life or the person of the injured party is in peril by reason of such attack upon his property." *Lilly v. State*, 20 Tex. App. 1 (Tex. Ct. App. 1885) (construing article 1224).

corporeal property. Once possession is lost by the true owner, even though the assailant's possession is unlawful, homicide would not be justified on the theory of protection of property.¹⁰⁸

The privilege to protect one's property with force, even to the extent of killing, can lead to shocking results. For instance, in *Lilly v. State*,¹⁰⁷ a homicide resulted from an argument over the possession of several pigs. The court upheld the defendant's contention that article 1224, not the common-law rule, controlled and that defendant was entitled to a charge that he was justified in protecting his property if he first resorted to all other reasonable means to prevent injury to it, and if the killing took place while the person killed was in the very act of making an unlawful and violent attack upon the property. Thus the possession of a pig becomes more cherished than the life of a human being.

Article 1224 uses the term "unlawful and violent attack." The earlier Texas cases placed a very liberal construction on this term so that a mere attempt to assume possession unlawfully (*e.g.*, in boundary disputes) was sufficient to justify a killing,¹⁰⁸ although one was not justified in killing a mere trespasser.¹⁰⁹

The more recent cases appear to restate the "unlawful and violent attack" requirement in a more conservative manner. Thus, where the right sought to be protected was a possessory right without any evidence indicating that the property was actually being injured, the court has refused a charge under article 1224.¹¹⁰ For instance, it has been held that where a city employee was shot while tacking up health notices on a house, the defendant was not entitled to a charge under article 1224, because the act of such employee was not an "unlawful and violent attack."¹¹¹ Also, if a person is initially upon property by right, but subsequently loses that right, a killing will not be justified in an attempt to oust him unless there is evidence that the deceased attempted to injure or remove the property.¹¹²

The courts take a more liberal view when the homicide is committed for the protection of one's home. Thus it has been held that a killing is justified if no more force than appeared necessary to the

¹⁰⁸ *Hartfield v. State*, 61 Tex. Crim. Rep. 515, 134 S.W. 1180 (1910); see *Turner v. State*, 129 Tex. Crim. Rep. 380, 87 S.W.2d 736 (1935); *Moon v. State*, 113 Tex. Crim. Rep. 230, 18 S.W.2d 635 (1929).

¹⁰⁷ *Supra* note 105.

¹⁰⁸ *Moon v. State*, 113 Tex. Crim. Rep. 230, 18 S.W.2d 635 (1929).

¹⁰⁹ *Hartfield v. State*, 156 Tex. Crim. Rep. 425, 243 S.W.2d 34 (1951).

¹¹⁰ *McCarley v. State*, 161 Tex. Crim. Rep. 263, 276 S.W.2d 300 (1955).

¹¹¹ *Id.* at 302.

¹¹² *Ashworth v. State*, 148 Tex. Crim. Rep. 561, 189 S.W.2d 875 (1945).

slayer is used to prevent the entering, and all other reasonable means, except retreat,¹¹³ are resorted to in order to discourage the entry.¹¹⁴

From a practical standpoint, the entire area of the law of defense of property is an unnecessary extension of the common-law doctrine of justifiable homicide. While articles 1222 and 1224 sufficiently protect an individual and his property against *violent* attacks, the ordinary disputes as to title and possession of property should be settled in the courts, not on the battle field.

V. CONCLUSION

The distinctive hallmark of a modern society is its ability to progress economically and socially. A study of jurisprudence will show that the law governing society tends to keep in step with the development of the society itself. This is only natural, for a modern society demands modern law.

The provisions of the Penal Code concerning justifiable homicide and their judicial interpretation do not reflect the tempo of our modern-day society, but rather are representative of the code of the "old west." Much of the Penal Code has remained unchanged since the date of its enactment in 1856. Specifically, in the area of justifiable homicide, no significant attempt on the part of the legislature has been made to modernize our law. Our courts have not facilitated the difficulties, but seem to have placed more emphasis upon technical rules of statutory construction than upon the development of a law to meet an everchanging society. Certainly, the legislature could perform no finer service than to reconsider the laws which shelter the violent elements of our society and which were outdated several decades ago.

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¹¹³ See p. 518 *supra*. At common law the only distinction in protection of the home and any other property was that if the law required retreat before killing in self-defense, one need not retreat from his own home. Stumberg, *supra* note 78, at 194.

¹¹⁴ *Myers v. State*, 159 Tex. Crim. Rep. 579, 266 S.W.2d 380 (1954).