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SOME CRIMINAL CONSEQUENCES OF DEFENDING THIRD PERSONS

The criminal consequences of going to the aid of a person under the apparent attack of another is an area of the criminal law marked by confusion and at least seeming inconsistencies. This discussion will be limited to situations where the defendent is charged with one of the various forms of assault or degrees of homicide and will not consider the possibility of a defendant's civil liability for the same action.

American courts recognize one of two general rules involving the liability arising out of the actions of an individual going to the aid of another. One view is that such a person goes to the aid of another at his peril, or steps into the shoes of the third person, and may without liability, do nothing more in the defense of the person than that person could lawfully have done in his own defense.[1] This "alter ego" rule, as it has been called, has been accorded the status, by jurisdictions in this country (at least by those adopting it), of being the majority view. The so-called minority view, requires only that the criminal liability of the intervenor be based on the facts as he reasonably concluded them to be.[2] Room is thus afforded for reasonable mistakes of fact by courts that adopt the latter position. From the reports of the decisions and the writings of the authorities there appears no clear-cut reason for assigning the designation of "majority" to the "alter ego" rule and "minority" to the reasonable mistake-of-fact doctrine.

The lack of clarity in this field of the law is not solely a product of modern judicial decisions but has its roots in the common law. At common law the privilege to use force in the defense of others overlapped with another important privilege, that of using force for the prevention of crime, which extended to all felonies and to misdemeanors amounting to breaches of the peace.[3] According to the common law the nature and degree of permitted force were the same under one privilege as under the other, and the normal mistake-of-fact doctrine also applied to each privilege.[4] While these privileges have not always been separated in explicit terms by modern courts, it is apparent that the distinctions between the two have been recognized and maintained in several jurisdictions.[5] The established rule today is that the reasonable mistake-of-fact doctrine applies to the right to use force for the prevention of felonies, and misdemeanors amounting to breaches of the peace.[6] Since, as pre-

1. Thompson v. State, 37 Ala. App. 446, 70 So. 2d 282 (1954); Commonwealth v. Hounchell, 280 Ky. 217, 132 S.W.2d 921 (1939); People v. Young, 11 N.Y.2d 274, 183 N.E.2d 319 (1962).
2. Brannin v. State, 221 Ind. 123, 46 N.E.2d 599 (1943); State v. Mounkes, 88 Kan. 193, 127 Pac. 637 (1912); State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506, cert, den., 36 N.J. 301, 177 A.2d 343 (1962).
3. Perkins, Criminal Law 880, 881 (1957).
4. Id. at 910.
5. Mitchell v. State, 43 Fla. 188, 30 So. 903 (1901); State v. Hennessey, 29 Nev. 320, 90 Pac. 221 (1907); State v. Robinson, 213 N.C. 273, 195 S.E. 824 (1938).
6. 64 W. Va. L. Rev. 342 (1962).

viously indicated, the doctrine does not always apply where the right to defend others is concerned, a situation which was uncertain at best at common law, is made even more so by judicial decision. While acting to prevent commission of a crime does not always involve a third person, almost always acts done in defense of others will have the further effect of tending toward prevention of a felony or a misdemeanor that is a breach of the peace. Where the reasonable mistake-of-fact doctrine applies as to the defense of others, and the jurisdiction also acknowledge the above-mentioned distinction between the two privileges, it would not make much difference which privilege or defense was chosen. But in a state following the "majority" view regarding the defense of others, and where both privileges are available, the defendant may, by discarding the defense of others and interposing the defense of the use of force to prevent a crime (where the reasonable mistake-of-fact doctrine nearly always applies), escape the effect of the "alter-ego" rule respecting the defense of others.[7] So, practically speaking, the results that would follow in a reasonable mistake-of-fact jurisdiction are often available to defendant in an "alter ego" jurisdiction that also recognizes the privilege of using force to prevent a crime, simply by claming that privilege instead of claiming the defense of others.

Whether a certain relationship between the defender and the person he is defending is needed before effect can be given to the reasonable mistake-of-fact doctrine in the defense of others is very seldom a clear-cut matter in jurisdictions in the United States. But if the privilege of using force to prevent a crime is available the defender need not be troubled by uncertainty surrounding the defense of others, for he may obtain the benefits of the mistake-of-fact rule by employing the privilege of using force to prevent a crime. The uncertainty mentioned above that hovers over the area of the defense of others arises when courts, in cases that on their facts do involve a particular relationship between defender and defended, hold that the reasonable mistake-of-fact doctrine applies in defending "others." In a discussion of this point in an article in the West Virginia Law Review[8] the writer states that in the United States, statements can be found to the effect that strangers may be defended. The writer then cites a case holding that way but says, since the case involved brothers, that the statement about strangers was dictum as were many similar statements in cases in this area. The question then naturally arises as to whether this can also be said of cases involving a special relationship which contain statements that "others" may be defended according to the requirements of the reasonable mistake-of-fact doctrine. If such statements, whether about strangers, or others, are dicta, in those cases that do involve particular relationships, then the alter ego rule would be the majority rule, if for no other reason, simply because of the lack of uniformity among jurisdictions following the mistake-of-fact

7. State v. Hennessey, supra note 5; Mammano v. State, 333 P.2d 602 (Okla. 1957); State v. Nodine, 198 Ore. 679, 259 P.2d 1056.
8. Supra note 6.

doctrine. To call such statements dicta, however, seems somewhat unrealistic and introduces still further confusion into this area of law. It would become exceedingly difficult to determine the value of a case as precedent. If the rule of a particular case, which allowed a person to defend another within a specific relationship under the mistake-of-fact doctrine, was stated in terms of defending "others" according to the reasoning employed in the article referred to, the holding of the case could only be applied in later cases involving defense of a brother, sister, mother or whatever relationship was present in the previous case. Thus such terms as "others," "strangers," "another" and similar terms would have to be defined and limited. Perhaps cases would be distinguished because they involved various degrees of kinship. So, unless the opinion of the particular judge specifically expresses that the holding of the case is to be confined to the particular relationship existing in the case, it is more reasonable to construe it to include any person whom the defender reasonably believed was in need of aid. Two of the most recent cases concerning the defense of others, one of them following the "alter ego" rule, cite cases demonstrating the mistake-of-fact doctrine that involve diverse relationships between the person defended and his benefactor.[9]

Where the intervenor has witnessed the affray from its inception and, consequently, is aware of the circumstances involved, it is clear that the "majority," or "alter ego" rule should apply. This does not indicate a preference for the majority over the minority view, however, because the minority view, as a matter of definition, in such an instance would be precluded. When the circumstances are known to the would-be defender no reasonable mistakes of fact on his part are possible. The question then becomes a matter of the quantum of force that may be used in the defense of the other, assuming that the person into whose shoes he has stepped is entitled to the aid. The permissible degree of force is that which reasonably appears to be necessary to the defendant even if, in fact, no force is needed at all.[10] The policy behind permitting force that reasonably appears to be necessary is that it would defeat the purpose of allowing aid in the first place and render that aid ineffective to demand that the rescuer take time, which is very seldom available, to determine what amount of force is proper. Of course the intervenor, by being subject to the gauge of reasonableness, can not employ an amount of force that is clearly unjustifiable under the circumstances.[11]

The reasons behind the argument advanced in favor of allowing an amount of force that reasonably appears to be necessary in the justifiable defense of a third person would also seem to be applicable in determining whether defense of the third person is justifiable in the first place. Requiring the defendant to pause to consider the amount of force required

9. State v. Chiarello, supra note 2; People v. Young, supra note 1.
10. Frew v. Teagarden, III Kan. 107, 205 Pac. 1023 (1922).
11. For an exhaustive discussion on the use of force in criminal law, see Walston, *Justification for the Use of Force in the Criminal Law*, 13 Stan. L. Rev. 566 (1961).

in the particular situation and to ascertain whether the person to whose defense he is proceeding is actually and lawfully entitled to aid from another would result in no defense at all until too late. The "majority" courts say, however, that to follow the reasonable mistake-of-fact doctrine would allow an innocent man who had been forced to strike in self-defense to be killed with impunity merely because appearances happened to be against him.[12] But the "minority" courts say the alter ego rule ignores one of the most basic principles of criminal law—that crimes *mala in se* require proof of at least general criminal intent.[13] And in answer to this argument proposed by the "alter ego" jurisdictions, the followers of the reasonable mistake-of-fact doctrine counter with the observation that innocent men are frequently killed under circumstances where the law properly holds the person causing the homicide free from criminal intent and guiltless of crime.[14] The authorities and scholars in the field also lend their support to the "minority" or reasonable mistake-of-fact doctrine.[15]

Wyoming has not as yet had to face the problems and questions in this segment of the law squarely and there is no way to predict with any reasonable certainty which rule the state would follow. The "alter ego" rule has, at first glance, the status of "majority view" to offer, but on careful inspection there seems to be no logical basis for this status, as it has not the support, numerically, of any notable majority of the jurisdictions that have ruled on the matter.[16] And, as previously mentioned, it has been treated unfavorably by scholars and authorities. The only Wyoming case that is even remotely connected really does not help at all.[17] There it was stated that a man had the right to prevent the commission of a felony in his home or the infliction on any of its inmates of a personal injury that may result in loss of life or great bodily harm.[18] But even the slight effect that this statement might have on the problem is negated by the fact that the part of it pertaining to "inmates" is clearly dictum since no third person was receiving any aid or defense from the defendant.

Wyoming's criminal statutes are patterned after those of Indiana, a state which has adopted the reasonable mistake-of-fact rule.[19] Perhaps there would be an element of persuasive precedent here, but the problem appears to be one of policy considerations rather than of statutory interpretation.

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12. Moore v. State, 25 Okla. Cr. 151, 219 Pac. 175 (1923).
13. People v. Young, supra note 1, 183 N.E.2d at 321.
14. 39 Ky. L.J. 460, 462.
15. Michael and Wechsler, *A Rationale of the Law of Homicade,* 37 Colum. L. Rev. 701, 737 (1937); Model Penal Code, § 3.05 (1), (Proposed Official Draft, 1962); Perkins, Criminal Law 909-12 (1957).
16. See the following lists of citations; State v. Chiarello, supra note 2, 174 A.2d at 510; People v. Young supra note 1, 183 N.E.2d at 319.
17. State v. Sorrentino, 31 Wyo. 129, 244 Pac. 420.
18. Id., 224 Pac. at 422.
19. Brannin v. State, supra note 2.