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INVITEE AND RETREAT RULE IN CRIMINAL LAW

American courts are not in accord as to whether a person *not at fault* in bringing on an attack may kill in self-defense even thought a safe means of retreat is available to him[1] A majority of jurisdictions follow a non-retreat rule[2] under which one who is unlawfully assaulted and reasonably fears that he will be killed or that great bodily harm will be inflicted upon him may, without being obliged to retreat, use force to the extent of killing the assailant.[3] In other words, "A person is not required to risk a retreat from an unjustified threatened attack."[4] A minority of jurisdictions today[5] follow a retreat rule[6] under which a person not at fault is required to retreat if the assaulted party can thus avoid the imminent danger without killing his assailant.[7]

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[1]Perkins, Criminal Law 894 (1957).

[2]Seward v. State, 228 Ark. 712, 310 S.W.2d 239 (1958); People v. Collins, 189 Cal. App. 2d 575, 11 Cal. Ptr. 504 (Dist. Ct. App. 1961);Enyard v. People, 67 Colo. 434, 180 Pac. 722 (1919); Ragland v. State, 111 Ga. 211, 36 S.E. 682 (1900); People v. Bush, 414 Ill. 441, 111 N.E.2d 326 (1953); Bange v. State, 237 Ind. 422, 146 N.E.2d 811 (1958); State v. Hatch, 57 Kan. 420, 46 Pac. 708 (1896); Caudill v. Commonwealth, 234 Ky. 142, 27 S.W.2d 705 (1930); State v. Boudreaux, 185 La. 434, 169 So. 459 (1936); Pitts v. State, 211 Miss. 268, 51 So. 2d 448 (1951); State v. Merk, 53 Mont. 454, 164 Pac. 655 (1917); State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902); State v. Gimmett, 33 Nev. 531, 112 Pac. 273 (1910); People v. Ligouri, 284 N.Y. 309, 31 N.E.2d 37 (1940); State v. Frizzelle, 243 N.C. 49, 89 S.E.2d 725 (1955); Perez v. State, 51 Okla. Crim. 180, 300 Pac. 428 (1931); Graham v. State, 98 Ohio St. 77, 120 N.E. 232 (1918); State v. Rader, 94 Ore. 432, 184 Pac. 79 (1919); Lopez v. State, 152 Tex. Crim. 562, 216 S.W.2d 183 (1949); Stoneham v. Commonwealth, 86 Va. 523, 10 S.E. 238 (1889); State v. Hiatt, 187 Wash. 226, 60 P.2d 71 (1936); State v. Zannino, 129 W. Va. 755, 41 S.E.2d 641 (1947); Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909).

[3]Brown v. United States, 256 U.S. 335 (1921); People v. Lewis, 117 Cal. 186, 48 Pac. 1088 (1897); State v. Hatch, 57 Kan. 420, 46 Pac. 708 (1896); State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902); Graham v. State, 98 Ohio St. 77, 120 N.E. 232 (1918); State v. Cushing, 14 Wash. 527, 45 Pac. 145 (1896); Palmer v. State, 9 Wyo. 40, 59 Pac. 793 (1900).

[4]State v. Zannino, 129 W. Va. 775, 41 S.E.2d 641, 645 (1947).

[5]The "retreat to the wall" doctrine was early applied by some courts in self-defense cases. Beale, Retreat from a Murderous Assault, 16 Harv. L. Rev. 567 (1903); Beale, Homicide in Self-Defense, 3 Colum. L. Rev. 526 (1903).

[6]Quillen v. State, 49 Del. 114, 110 A. 2d 445 (1955); Harris v. State, 104 So. 2d 739 (Fla. Dist. Ct. App. 1958); State v. Haffa, 246 Iowa 1275, 71 N.W.2d 35 (1955); State v. Cox, 138 Me. 151, 23 A.2d 634 (1941); People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961); State v. Rheams, 34 Minn. 18, 24 N.W. 302 (1885); State v. Pontery, 19 N.J. 457, 117 A.2d 473 (1955); Commonwealth v. McKwayne, 221 Pa. 449, 70 Atl. 809 (1908); State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Roberts, 63 Vt. 139, 21 Atl. 424 (1891).

[7]Jackson v. State, 177 Ala. 12, 59 So. 171 (1912); Owens v. State, 64 Fla. 383, 60 So. 340 (1912); State v. Gough, 187 Iowa 363, 174 N.W. 279 (1919); State v. DiMaria, 88 N.J.L. 416, 97 Atl. 248 (Sup. Ct. 1916).

When a person is *at fault,* however, in bringing on the difficulty that gives rise to the threat to his life, the general rule in all jurisdictions is that he must retreat before a right of self-defense, justifying the taking of human life, arises.[8] One troublesome aspect of the application of these apparently clear rules of self-defense arises when it is not clear whether the person who kills was at fault or free from fault.

The problem recently arose in South Carolina, a retreat rule jurisdiction,[9] in the case of *State v. Bethea.*[10] The evidence was conflicting, but taking the view of the evidence most favorable to the defendant, the jury could have found the following: The defendant, while visiting his mistress in her home and at her invitation, told her of his intention to sever their illicit relationship. As he spoke, the mistress became violent and unruly, menacingly waving a pistol, so that the defendant's efforts to leave the premises were thwarted. Fearing for his life, the defendant drew a pistol and shot the woman who died a short time later from the wounds so inflicted. In substance, the defendant asked the court for an instruction that in this view of the facts an invitee is under no duty to retreat. The prosecution contended that if a safe means of retreat was open, the defendant, although an invitee, was under a duty to retreat rather than to take his mistress's life. The trial court refused the instruction asked by the defendant who was subsequently convicted of manslaughter.

On an appeal to the Supreme Court of South Carolina, the conviction was affirmed by a divided court. The majority of the court found no merit in the defendant's argument that cases involving no duty to retreat were applicable since the court was of the opinion that the evidence when viewed most favorably to the defendant showed that he was not free from fault. Therefore, the court applied the rule applicable to parties at fault. The dissenting judge, however, viewing the same evidence believed that the jury might have found that the defendant was without fault.[11] Consequently, he thought that the defendant was entitled to an instruction relating to invitees in order

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[8]Sullivan v. State, 102 Ala. 135, 15 So. 264 (1894); State v. Jackson, 227 S.S. 271, 87 S.E.2d 681 (1955); Carter v. State, 30 Tex Ct. App. R. 551, 17 S.W. 1102 (1891).

[9]State v. Davis, 214 S.C. 34, 51 S.E.2d 86 (1948); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942); State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937); State v. Gordon 128 S.C. 422, 122 S.E. 501 (1924); State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922); State v. Burdette, 118 S.C. 164, 101 S.E. 664 (1919); State v. Summer, 55 S.C. 32, 32 S.E. 771 (1899); State v. McIntosh, 40 S.C. 349, 18 S.E. 1033 (1894); State v. Trammell, 40 S.C. 331, 198 S.E. 940 (1894).

[10]126 S.E.2d 846 (S.C. 1962).

[11]Id. at 851.

to have the jury determine whether the South Carolina rules relating to parties at fault or rules relating to parties not a fault should be applied. If the rules relating to parties not at fault apply, under the dissenting judge's view, the defendant should have the benefit of an instruction that he would not be required to retreat until he had been asked to leave.[12]

In support of his view concerning invitees, the dissenting judge cited the prior South Carolina case of *State v. McIntosh*.[13] The *McIntosh* case did place emphasis on the special status of the parties as invitee and guest,[14] but it is not directly on point as the householder was the person who killed and not the victim as in the *Betha*[15] case.

Rather than stretching the rule applied in *McIntosh*[16] to fit the peculiar situation in *Betha*,[17] a stronger argument could be made for making an exception to the retreat rule, under which an invitee in a home is not required to retreat when he is not at fault in inducing an encounter with his host or hostess. South Carolina follows the retreat doctrine[18] but has been liberal in modifying and refining the rule so that under certain conditions one who is feloniously attacked does not need to retreat.[19] For example, *State v. Davis*,[20] recognized that a person without fault assaulted on his own premises is under no duty to retreat and may stand his ground and use necessary force to repel the attack, even to the extent of killing the assailant. The court said this is "true whether the attack occurs in the defendant's home, place of business, or elsewhere on property owned or lawfully occupied by him."[21] Such a broad rule eliminates most situations from the retreat rule, and an exception in the *Bethea*[22] case could be justified on the ground that the defendant was on property "lawfully occupied by him."

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[12]Ibid.

[13]State v. McIntosh, 40 S.C. 349, 18 S.E. 1033 (1849). The deceased, while in the defendant's house was urged by the defendant to take part in a Christmas party. The party was a drunken debauch during which the defendant killed his guest. The court explained that the defendant was not entitled to any right to protect his home from an invited guest until he had first given the invitee a notice to leave.

[14]State v. McIntosh, 40 S.C. 349, 18 S.E. 1033 (1894).

[15]See note 10 supra.

[16]See note 14 supra.

[17]See note 10 supra.

[18]See note 9 supra.

[19]State v. Davis, 214 S.C. 34, 51 S.E.2d 86 (1948); State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942). See generally, Perkins, Criminal Law 902 (1957).

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

[21]Id. at 87.

[22]See note 10 supra.