Washington University Law Review

Volume 20 | Issue 2

1935

Imperfect Self-Defense

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Notes

IMPERFECT SELF-DEFENSE

I. THE TRADITIONAL RULE

At common law two classes of homicide were excusable: homicide *per infortunium*, or by misadventure; and homicide *se defendendo*, or in self-defense. In the early common law, one who committed excusable homicide was, upon such a finding by the jury, remitted to prison in the custody of the sheriff to wait for pardon from the king.[1] Today, excusable homicide is a ground for acquittal by the jury.

The elements of homicide *se defendendo* have been stated as follows: "To render a homicide justifiable or excusable on the ground of self-defense—(1) It must reasonably appear that there is imminent danger of death, or of some other felony, or of great bodily harm. . . (2) In the case of excusable self-defense, in a sudden affray, the party threatened must retreat as far as he can with safety before taking his adversary's life. . . (3) The slayer *must not have been the aggressor*, or otherwise have provoked the difficulty."[2] Many states adhere strictly to the doctrine that an aggressor cannot rely upon self-defense, notwithstanding the possibility that his intent at the time of provoking the difficulty may not have been felonious, unless he clearly withdraws from the conflict and is thereafter forced to kill the deceased in order to save his own life or to protect himself from serious bodily injury.[3] The courts of the following states have adopted this rule: Arizona,[4] Oklahoma,[5] California,[6] Kansas,[7] New Jersey,[8] Ohio,[9] Rhode Island,[10] Indiana,[11] Pennsylvania,[12] and Iowa.[13] The

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[1] Fitzh. Abr. Corone, pl. 284, Anonymous Case, Northampton Eyre (1329); Translation in 3 Stephen, "History of Crim. Law", 38; also in Sayre, "Cases on Criminal Law" p. 600. See also 4 Blackstone Com. 188, 1 East, P. C. 279, and 1 Hale, P. C. 425, 482.

[2] Clark and Marshall, "Crimes" (3rd ed.), p. 347. (Italics are mine.)

[3] Russell, "Crimes and Punishments" (8th ed.), p. 769-773. Kerr, "Law of Homicide", p. 201. 1 Bishop, "Criminal Law" (9th ed.), p. 603.

[4] Micias v. State (Arizona S. Ct. 1932) 6 Pac. (2nd) 423.

[5] Gross v. State (Okla. Cr. App. 1931) 297 Pac. 309.

[6] People v. Bush, (1884) 65 Cal. 129, 3 Pac. 590. People v. Finali, (1916) 31 Cal. App. 479, 160 Pac. 850. People v. Hoover, (Cal. App. 1930) 290 Pac. 493.

[7] State v. Schroeder, (1918) 103 Kan. 770, 176 Pac. 659.

[8] State v. Agnesi, (1919) 92 N. J. Law 53, 104 Atl. 299; affirmed in 92 N. J. Law 638, 106 Atl. 299.

[9] State v. Morgan, (1919) 100 O. St. 66, 125 N. E. 109.

[10] State v. Ballou, (1898) 20 R. I. 607, 40 Atl. 861.

[11] Story v. State, (1885) 99 Ind. 413.

[12] Logue v. Com. (1861) 38 Pa. 265.

[13] State v. Benham, (1867) 23 Ia. l. c. 162, 92 Am. Dec. 416. State v. Murdy, (1891) 81 Ia. 614, 47 N. W. 867. State v. McCaskill, (1913) 160 Ia. 554, 142 N. W. 445.

basis for such a rule is that the defendant, having produced or provoked the situation necessitating the killing, is held responsible for the results thereof and is therefore deprived of the right to rely upon self-defense. The kinds of provocation arising in these cases will be treated later.

II. THE MISSOURI DOCTRINE OF IMPERFECT SELF-DEFENSE

Of the several variations from the rule just stated the doctrine of imperfect self-defense is the most widely accepted. Although the earlier Missouri cases clung to the traditional view,[14] in 1884 the Supreme Court began to shift its position. In *State v. Culler*[15] the defendant, convicted of murder in the second degree, alleged error in an instruction which deprived him of self-defense if the jury found him to have been the aggressor. The court sustained his objection, pointing out that "it is only when the wordy quarrel or the actual non-felonious combat is provoked by the commencer or aggressor in order to afford opportunity for him to kill his adversary, that the right of self-defense ceases." But in this case the court failed to clarify its choice of one of two possible positions, namely: when under such circumstances, the desible positions, namely: when under such circumstances the defendant has established self-defense should he receive an acquitlesser penalty?

Three years later, however, the court adopted the latter position. In *State v. Partlow*[16] the defendant, likewise convicted of murder, took exception to an instruction similar to that given in *State v. Culler* and, in addition, alleged error in the refusal of the trial court to grant certain instructions, one of which was to the effect that before the jury can refuse to allow the defendant the plea of self-defense, they must believe from the evidence that the defendant provoked or voluntarily entered the fight with a felonious intent to maim, wound, hurt, or kill the deceased. The most unfavorable evidence against the accused tended to show that he had provoked the quarrel by calling the deceased a liar. In sustaining these contentions of the defendant, the court adopted the rule as stated in the prior Texas case of *Reed v. State*,[17] holding that there are two types of self-defense in the law of homicide: perfect, and imperfect self-defense. The accused may rely upon the former only when he acted from necessity in killing his adversary and was wholly free from producing the occasion from which such necessity arose. However, if the defendant himself was in the wrong and, as a result was placed

[14] State v. Hays (1856) 23 Mo. 287. State v. Starr (1866) 38 Mo. 270. State v. Linney (1873) 52 Mo. 40. State v. Underwood (1874) 57 Mo. 40. State v. Peak (1884) 85 Mo. 193.

[15] (1884) 82 Mo. 623.

[16] (1887) 90 Mo. 608, 4 S. W. 14.

[17] (1882) 11 Tex. App. 509.

in a situation necessitating the killing, the law limits his right of self-defense according to the magnitude of his wrong, which in turn, is measured by his intent in provoking the difficulty. This ruling has been adopted by the United States Supreme Court,[18] and by the courts in Nevada,[19] North Carolina,[20] New York,[21] Virginia,[22] West Virginia,[23] Tennessee,[24] Colorado,[25] Illinois,[26] and Texas;[27] by dicta it is upheld also in Louisiana[28] and Michigan.[29] The Texas courts have recently wavered somewhat, sometimes allowing an acquittal in cases which the Missouri courts would have reduced only to manslaughter under the imperfect self-defense rule.[30] There is a division among text writers as to the validity of the Missouri doctrine.[31]

Care should be taken not to confuse the Missouri view as to imperfect self-defense with the rule as to chance medley, where the parties begin the quarrel and both are apparently at fault; here the offense is also manslaughter. It is also to be distinguished from the doctrine of withdrawal, which allows the defendant perfect self-defense where he provokes the quarrel, withdraws in good faith and, being pursued by the adversary, kills in self-defense.[32]

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[18] Wallace v. United States, (1896) 162 U. S. 466, 40 L. Ed. 465.

[19] State v. Huber, (1915) 38 Nev. 253, 148 Pac. 562.

[20] State v. Dove, (1911), 156 N. C. 653, 72 S. E. 792. State v. Ray, (1914) 166 N. C. 420, 81 S. E. 1087. State v. Crisp (1916) 170 N. C. 785, 87 S. E. 511.

[21] People v. Filippelli, (1903) 173 N. Y. 509, 66 N. E. 402.

[22] Hash v. Com., (1891) 88 Va. 194, 13 S. E. 405.

[23] State v. Taylor, (1905) 57 W. Va. 228, 50 S. E. 247.

[24] State v. Foutch, (1896) 95 Tenn. 711, 34 S. W. 423.

[25] Boykin v. People, (1896) 22 Colo. 496, 45 Pac. 419.

[26] Adams v. People, (1868) 47 Ill. 376. Kinney v. People, (1884) 108 Ill. 519.

[27] Reed v. State, (1882) 11 Tex. App. 509. King v. State, (1882) 13 Tex. App. 277. Logan v. State, (1884) 17 Tex. App. 50. Meuly v. State, (1888) 26 Tex. App. 561. Blackwell v. State, (1926) 103 Tex. Cr. Rep. 423, 281 S. W. 213. Crowley v. State, (Tex. Cr. App. 1931) 35 S. W. (2nd) 437.

[28] State v. Erwin, (1913) 133 La. 550, 63 So. 167. State v. Domingue, (1928) 166 La. 859, 118 So. 46.

[29] People v. Pearl, (1889) 76 Mich. 207, 42 N. W. 1109.

[30] Roberson v. State (Tex. 1918) 203 S. W. 349.

[31] The rule is recognized in: Kelley, "Criminal Law and Procedure" (4th ed.), par. 531; 1 Bishop "Criminal Law" (9th ed.), p. 603; Clark and Marshall (3rd ed.), "Crimes", par. 282; Sherwood, "Commentaries on Criminal Law", p. 52; Horrigan and Thompson, "Cases on Self-defense", p. 227n.; and in Wharton, "Criminal Law" (12th ed.), par. 615. The traditional view is adopted in Russell, "Crimes and Punishments" (8th ed.), p. 769-773; Gilbert, "Criminal Code and Penal Law", p. 371; and Michie, "Homicide", p. 342.

[32] Rowe v. United States, (1896) 164 U. S. 546, 41 L. Ed. 547, 17 Sup. Ct. Rep. 172.

III. RATIONALE OF IMPERFECT SELF-DEFENSE

Of the scores of cases adopting the Missouri rule, few give arguments in its support; the majority of courts evidently are content to cite the minority holdings and to ignore the weight of authority contra. The Texas court in *Reed v. State* appears to contain the first attempt to support the doctrine by argument. In this case the trial court instructed that if deceased found his wife in the act of adultery with the defendant, and the deceased "then and there made an attack on defendant, defendant had no right to resist such attack, and an attack made upon defendant under such circumstances does not come within the definition of self-defense." In the opinion, the court assumed that this instruction was based on what was then Article 567 of the state penal code, which read, ". . . homicide is justifiable when committed by the husband upon the person of anyone taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated." The conviction of murder was reversed, the upper court declaring that the instruction given was erroneous because it predicated the defendant's guilt upon what would have been the law had the deceased killed the defendant, including: "The accused is always guilty or innocent from his own standpoint, that is, his personal, individual acts with relation to the matter charged." Instead of instructing the lower court to apply the rule convicting the defendant of voluntary manslaughter when killing is committed under such provocation as would arouse in a reasonable person a heat of passion,[33] the court stated that the case warranted application of the doctrine of imperfect self-defense, taking the stand which the Missouri Supreme Court later took in the *Partlow Case.* The court then attempted to reconcile its view with the earlier cases by saying that they held that "if the individual assaulted, being himself without fault, reasonably apprehends death or serious bodily harm to himself unless he kills the assailant, the killing is justifiable. . .[34] But a person cannot avail himself of a necessity which he has knowingly and wilfully brought upon himself. . . That is, it (referring to the necessity) will not afford him a *justification* in law." The court attempted to reason that although the older cases did preclude giving the defendant justification for the crime, they did not necessarily preclude giving him a partial excuse. In criticism, it must be said that while in the early common law there was a sharp distinction between justifiable and excusable homicide,[35] homicide in self-defense being excusable and not justifiable, modern courts often use the terms interchangeably. The Texas court, therefore, resurrected this distinction without

[33] Manning's Case, (K.B. 1671) T. Raym. 212; 83 Eng. Rep. 112.
[34] 1 Bishop "Criminal Law" (9th ed.) par. 865.
[35] Clark and Marshall, "Crimes" (3rd ed.), par. 273.

warrant in modern precedent, and failed to justify its decision on other grounds.

The reasoning of the Missouri court was likewise feeble. In the Partlow case our Supreme Court stated the rule that one who begins a quarrel, or brings on a difficulty, with the felonious purpose of killing the person assaulted, upon accomplishment of such purpose, is guilty of murder and cannot avail himself of the doctrine of self-defense; and then strangely went on to assert that as a logical conclusion it followed that one bringing on a difficulty without a felonious intent would not be guilty of murder. The court concluded by saying: "To deny this obvious deduction is equivalent to the anomalous assertion that there can be a *felony* without a *felonious intent;* that the act done characterizes the intent, and not the intent the act." Later cases reach similar decisions on this basis.[36]

Perhaps the only plausible basis for the rule is given by Bishop, who states: "The person attacked by his unjustified counter-attack has himself become a wrongdoer and has thus conferred upon his assailant the legal right to resist him to death itself."[37] He should have used the qualified words, "legal right," with the word, "imperfect", as no courts convict a person of manslaughter for doing what he had the legal right to do. Another basis might well lie in the fact that because the law attempts to establish the various crimes and their penalties with reference to the relative degree of anti-social conduct involved, it must logically make the defendant's crime under the situations in imperfect self-defense cases manslaughter rather than murder. Few persons would assert that a killing without an intent to commit a killing or to inflict great bodily harm on another is conduct as anti-social as a killing with such an intent formed at the beginning of the affray. Possibly this is the explanation for the trend of American state decisions during the past few decades towards the Missouri rule.

IV. INCIDENTS OF THE DOCTRINE

An examination of incidental questions such as the defendant's intent, the presumptions, the burden of proof, and reversible error is of value.

As to the question of intent, the cases may be summarized thus: 1) if the defendant provoked the difficulty with the intent to kill, to commit great bodily injury upon the deceased, or to commit any other felony, he may not rely upon imperfect self-defense, but 2) if the defendant provoked the difficulty without an intent to kill, to commit great bodily injury upon the deceased, or to commit any other felony, he may rely upon the

[36] Wallace v. United States, (1896) 162 U. S. 466. Hash v. Com., (1891) 88 Va. 194, 13 S. E. 405.

[37] 1 Bishop "Criminal Law" (9th ed.) p. 603.

doctrine, provided that the other required elements also are present.[38]

As to the burden of proof on the issue of imperfect self-de-

[38] The Missouri cases sustain the following propositions with regard to intent:

1. If the defendant provoked the quarrel with the intent to kill the deceased, he cannot avail himself of this doctrine. So held in: State v. Paxton, (1894) 126 Mo. 500, 29 S. W. 705; State v. Gilmore, (1888) 95 Mo. 554, 8 S. W. 359; State v. Lewis, (1893) 118 Mo. 79, 23 S. W. 1083; and State v. Bailey, (1905) 190 Mo. 257, 88 S. W. 733.

2. If the defendant began the quarrel in order to inflict great bodily harm on the deceased, the rule does not apply. Held in: State v. Gilmore, supra; State v. Dunn, (1909) 221 Mo. 530, 120 S. W. 1179.

3. Converse of (2). Held in: State v. Rapp, (1897) 142 Mo. 443, 44 S. W. 270; State v. Hopper, (1897) 142 Mo. 478, 44 S. W. 272; State v. Patterson, (1900) 159 Mo. 560, 60 S. W. 1047; State v. Gordon, (1905) 191 Mo. 114, 89 S. W. 1025.

4. If the defendant began the quarrel with a felonious intent, he is deprived of imperfect self-defense. Held in: State v. Partlow, supra note 16; State v. Berkley, (1887) 92 Mo. 41, 4 S. W. 24; State v. Kretschmar, (1910) 232 Mo. 29, 133 S. W. 16; State v. Painter, (1931) 329 Mo. 314, 44 S. W. (2nd) 79.

5. Converse of (4). Held in: State v. Gamble (1893), 119 Mo. 427; State v. Partlow, ib.; State v. Berkley, supra; State v. Parker, (1891) 106 Mo. 217, 17 S. W. 180; See Horrigan & Thompson, "Cases on Self-Defense" p. 227n.

6. Where the defendant in provoking the quarrel did not commit or attempt to commit a felony, he may be denied the right of imperfect self-defense. Held in State v. Creed, (1923), 299 Mo. 307, 252 S. W. 678; Dictum in Reed v. State, supra, fn. 17.

7. If the defendant entered into the quarrel with the intent to wreak or gratify malice he cannot avail himself of this doctrine. Held in: State v. Feeley, (1906) 194 Mo. 300, 92 S. W. 663; State v. Caldwell (Mo. S. Ct. (1921) 231 S. W. 613.

8. Converse of (7). Held in: State v. Adler, (1898) 146 Mo. 18, 47 S. W. 794; State v. Hopper, (1898) 142 Mo. 478, 44 S. W. 272; State v. Goddard, (1898) 146 Mo. 177, 48 S. W. 82.

9. If the defendant's intent was to commit merely an ordinary battery and the defendant thus provoked the quarrel, the rule is available to him. Held in: State v. Gamble, (1893) 119 Mo. 427, 24 S. W. 1030; State v. Eastham, (1912) 240 Mo. 241, 144 S. W. 492.

10. If the defendant sought a renewal of the quarrel using only words and intending to bluff and over-awe the deceased he may rely upon imperfect self-defense. Held in: State v. Roberts, (1920) 280 Mo. 669, 217 S. W. 988.

11. The mere fact that the defendant voluntarily enters or provokes the difficulty will not deprive him of the rule. Held in: State v. Patterson, supra; State v. Hopper, supra; State v. Rapp, id.; State v. Gordon, supra—these cases all being cited in this note.

12. If the defendant is an accomplice knowing that the co-defendant sought the deceased for the purpose of merely assaulting and whipping him, but without a felonious intent to use upon him a deadly weapon or inflict great bodily injury, and that the defendant accomplice accompanied him to the scene for the purpose and with the intent of aiding, encouraging, or assisting him if necessary, and the co-defendant killed the deceased to save his own life, the defendant may rely upon the doctrine. Held in: State v. Darling, (1907) 202 Mo. 150, 100 S. W. 631.

fense, there are no cases in point. Probably when such a question arises the courts will adopt the rule as it is in perfect self-defense, upon which point the Missouri Supreme Court has wavered,[39] finally reaching its present holding in *State v. Malone*,[40] in which case the court held an instruction erroneous which stated that the defendant had the burden of proving his self-defense to the reasonable satisfaction of the jury before he could be acquitted upon that ground, as the state has the burden of proving all the issues of the case beyond a reasonable doubt.

It had long been settled in this state that when the defendant was prosecuted for murder, if the homicide was proved there resulted a presumption of second degree murder, and the defendant then had the burden of bringing forth evidence mitigating the crime to manslaughter or giving complete acquittal on justification or excuse,[41] but later cases apparently limit this presumption to cases of violent killing or cases in which the defendant used a deadly weapon with intent to kill,[42] or where the defendant used a deadly weapon on a vital part of deceased's body.[43] Some limit the presumption to cases in which there is established an intentional killing of a human being by another, it being also required that the defendant use a deadly weapon at a vital part of the body of the deceased.[44]

A conviction of murder having resulted in a particular case, when is a failure to embody the doctrine in the instructions reversible error? All the cases agree that if there is any evidence showing that the defendant provoked the quarrel without an intent to kill, to commit serious bodily harm, or to commit a felony, and that he killed the deceased in self-defense in reasonable fear of death or great bodily injury at the hand of deceased, the indictment being for murder, the defendant is entitled to an in-

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[39] State v. Brown, (1877) 64 Mo. 367, the first Missouri case in point, held that an instruction placing the burden of proof on the state was properly refused. State v. Hill, (1879) 69 Mo. 451, held that an instruction putting the burden on the defendant was erroneous for that reason. State v. Jones, (1883) 78 Mo. 278, held that the defendant must establish self-defense from the whole evidence to the reasonable satisfaction of the jury, although the jury should not convict if they have a reasonable doubt as to his guilt. State v. Roberts, (1920) 294 Mo. 284, 242 S. W. 669, held that the defendant had the burden of proof.

[40] (Mo. Sup. Ct. 1933) 62 S. W. (2nd) 909.

[41] State v. Gassert, (1877) 65 Mo. 352. State v. Lesterman, (1878) 68 Mo. 408. State v. Philpott, (1912) 242 Mo. 504, 146 S. W. 1160. State v. Moore, (Mo. Sup. Ct. 1921) 235 S. W. 1056. State v. Henke, (1926) 313 Mo. 615, 285 S. W. 392.

[42] State v. Eason, (Mo. S. Ct. 1929) 18 S. W. (2nd) 71. State v. Cook, (Mo. S. Ct. 1931) 44 S. W. (2nd) 90. State v. Majors, (1931), 329 Mo. 148, 44 S. W. (2nd) 163. State v. Minor, (1906) 193 Mo. 597, 92 S. W. 466. State v. Evans, (1894) 124 Mo. 397, 28 S. W. 8.

[43] State v. Malone, (Mo. S. Ct. 1931) 39 S. W. (2nd) 786.

[44] Ex parte Verden, (Mo. S. Ct. 1922) 237 S. W. 735. State v. Snow, (1922) 293 Mo. 143, 238 S. W. 1069.

struction on imperfect self-defense. Under such circumstances a conviction of murder is reversible if the trial court has refused to grant such an instruction or gives an instruction on self-defense, failing to state the rule of imperfect-self-defense.[45] If no evidence as to self-defense has been introduced at the trial, the defendant is not entitled to such an instruction.[46] Where no evidence has been introduced to show that the defendant provoked the difficulty which resulted in the homicide, and the evidence points either to murder or acquittal on self-defense, a refusal or failure to give an instruction on imperfect self-defense is not reversible error.[47] If no evidence has been introduced to prove that the defendant's intention was to commit a misdemeanor or anything less than a felony, an instruction on perfect self-defense is not reversible error merely because it fails to qualify itself by stating giving the law as to imperfect self-defense.[48] If the defendant provoked the difficulty with a knife, refusal to grant an instruction on the doctrine is not reversible error, since the evidence conclusively showed that the intent of the defendant in provoking the difficulty was felonious.[49] And, finally, in all cases in which the defendant was convicted merely of manslaughter, any error as to imperfect self-defense is not sufficient ground for a reversal.[50]

V. APPLICATION OF IMPERFECT SELF-DEFENSE

The result of application of the Missouri rule to specific cases as compared with an application of the traditional doctrine to cases involving the same basic factual circumstances is apparent. The cases in point may be grouped into two divisions with regard to the type of provocation on the part of the defendant, namely: (1) mere words, and (2) use of physical force,—the defendant's intent in neither case being felonious. In each case the defendant would be convicted of murder under the older view, but only of manslaughter in the courts adopting the Missouri rule. In the first division of cases, *Macias v. State*[51] resulted in

[45] State v. Gordon, supra, note 38 (3). State v. Adler, (1898) 146 Mo. 18, 47 S. W. 794. State v. Evans, supra, note 42. State v. Vaughan, (1897) 141 Mo. 514, 42 S. W. 1080. State v. Rapp, (1897) 142 Mo. 443, 44 S. W. 270. State v. Hopper, (1897) 142 Mo. 478, 44 S. W. 272. State v. Patterson (1900) 159 Mo. 560, 60 S. W. 1047.

[46] State v. Gilmore, (1888) 95 Mo. 554, 8 S. W. 359.

[47] State v. Zorn, (1907) 202 Mo. 12, 100 S. W. 591.

[48] State v. Dunn, supra, note 38 (2).

[49] State v. Painter, supra, note 38 (4).

[50] State v. Dollarhide, (1933) 333 Mo. 1087, 63 S. W. (2nd) 999.

[51] (Arizona Sup. Ct., 1931) 6 Pac. (2nd) 423. Other examples are People v. Hoover, (Cal. App., 1930) 290 Pac. 493; State v. Murdy, (1891) 81 Ia. l. c. 614, 47 N. W. 867; Barton v. State, (1916) 72 Fla. 408, 73 So. 230; Kimbrough v. State, (1878) 62 Ala. 248; and Eiland v. State, (1875) 52 Ala. 324. See also State v. Christian, (1877) 66 Mo. l. c. 144 (before State v. Partlow).

a conviction of first degree murder, although the defendant provoked the quarrel with mere words; this case may be compared with numerous Missouri cases in which the defendant could be convicted only of manslaughter; as where the defendant called to the deceased: "You have my still," and requested deceased to come out of the barn;[52] where the defendant went to deceased's home, asked for defendant's wife, and replied to deceased's answer: "That's a lie!";[53] where the defendant began the quarrel by saying to the deceased: "You have been telling around that I have been bootlegging whiskey" or "selling whiskey";[54] and where the defendant renewed the quarrel with threatening, bluffing, and menacing words.[55] In the second division of cases, *Leonard v. State*[56] is typical of the result of application of the older rule. In this case the accused began the quarrel by hitting deceased with a club; and the court held that there could be no self-defense in the case as a matter of law as "Such a plea can never be invoked, or made available by a defendant, unless he be reasonably free from fault in bringing on the difficulty." While this case resulted in a murder conviction, the defendant was convicted of only manslaughter in *Boykin v. People*,[57] a case somewhat similar in facts arising in a jurisdiction following the Missouri doctrine. Although here the defendant likewise began the difficulty by beating the deceased with a club, the court held that if the defendant intended to commit only a disdemeanor the accused could not be completely deprived of self-defense. In the Missouri case of *State v. Eastham*[58] the defendant's accomplice helped the defendant provoke the quarrel by striking the deceased and the holding in *Boykin v. People* was followed. In another Missouri case[59] the same result was reached where the provocation consisted of the defendant putting his hand against the deceased, bidding him to retire. Thus it is seen that the distinction made by the judges is actual in fact as well as in legal theory.

VI. OTHER VARIATIONS FROM THE TRADITIONAL RULE

Another variation from the older doctrine is upheld in Florida[60] and Idaho,[61] in which jurisdiction the defendant cannot be

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[52] State v. Rennison, (1924) 306 Mo. 473, 267 S. W. 850.
[53] State v. Partlow, supra, note 16.
[54] State v. Pennington, (1898) 146 Mo. 27, 47 S. W. 799.
[55] State v. Roberts, (1919) 280 Mo. 669, 217 S. W. 998.
[56] (1880) 66 Ala. 461; see also Lewis v. State, (1889) 88 Ala. 11, 6 So. 755.
[57] (1896) 22 Colo. 496, 45 Pac. 419.
[58] (1912) 240 Mo. 241, 144 S. W. 492.
[59] State v. Davidson, (1888) 95 Mo. 155, 8 S. W. 413.
[60] Lovett v. State, (1892) 30 Fla. 142, 11 So. 550; Ballard v. State, (1893) 31 Fla. 451, 24 So. 145; Padgett v. State, (1898) 40 Fla. 451, 24 So. 145; Gaff v. State, (Fla. Sup. Ct. 1931) 138 So. 48; Bowman v. State, (Fla. Sup. Ct. 1934) 152 So. 739.
[61] State v. Fox, (Idaho Sup. Ct. 1933) 16 Pac. (2nd) 663.

deprived of self-defense if only he be *reasonably* free from fault in provoking the difficulty. This distinction is for practical purposes unimportant except in a few cases,[62] as only rarely would the defendant be reasonably free from fault and yet not completely without fault in bringing on the difficulty.

The Mississippi courts apparently are more liberal to the defendant than jurisdictions following the Missouri Supreme Court. In *Smith v. State*,[63] the court reversed a conviction of murder upon an improper refusal of the trial court to give an instruction requested that insulting words were not sufficient provocation to deprive the defendant of self-defense. This case is similar to the Missouri case of *State v. Culler*[64] in that the court failed to state whether in such a situation the defendant would be entitled to rely upon perfect or imperfect self-defense. Dicta in other Mississippi cases lean toward the former.[65]

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"PUBLIC USE" IN FEDERAL EMINENT DOMAIN

Numerous projects contemplated or actually initiated by the present Administration require the use of the federal power of condemnation. Especially significant at the moment is the bill now before Congress appropriating some four billion dollars to be used by the President in various ways for relief against the effects of the depression, and authorizing him to acquire any real or personal property or any interest therein by the power of eminent domain.[1] It is the purpose of this discussion to examine the extent to which the United States Government, as distinguished from the States, can thus take private property, aside from questions of procedure and just compensation, as evidenced by the types of cases in which the power has been exercised in the past, and the principles established therein. In considering the problem it is well to remember that the power to condemn, practically if not theoretically, rises from the power to appropriate for the general welfare, and that the questions which arise in considering the validity of acts of either type are basically analogous.

For nearly a hundred years after the adoption of the Constitution it was considered doubtful by both writers and states-

[62] McBryde v. State, (1908) 156 Ala. 44, 47 So. 302. Brewer v. State, (1909) 160 Ala. 66, 49 So. 336.

[63] (1898) 75 Miss. 542, 23 So. 260.

[64] Supra, note 15.

[65] Prine v. State, (1896) 73 Miss. 838, 19 So. 711; Lofton v. State, (1902) 79 Miss. 732, 31 So. 420; Rogers v. State, (1903) 82 Miss. 479, 34 So. 320; Lucas v. State, (1915) 109 Miss. 82, 67 So. 851. See also Brown v. State, (1877) 58 Ga. 212.

[1] H. J. Res. 117.