A NEW QUALIFIED DEFENCE TO MURDER

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"If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter—not murder."[1] This proposition is taken from the judgment of Lowe J. in *McKay*,[2] a Victorian case where excessive and lethal force was used in defence of property.[3]

In the subsequent case of *Howe*[4], where excessive and lethal force was used in self-defence, the South Australian Court of Criminal Appeal accepted the proposition which Lowe J. had formulated in *McKay*, though they recognised "that this principle, which we find implicit in the early cases, and which has been stated recently in the cases to which we have referred, does not appear to have attracted the attention of the text-book writers and commentators, nor has it been the subject of consideration by any appellate court in England."[5] The same principle of law has recently been applied in the Victorian case of *Bufalo*[6] and by the Court of Criminal Appeal of New South Wales in *Haley*.[7]

This explicit formulation by the Australian courts of a previously unrecognised qualified defence to a charge of murder is a major development in the law of homicide. It recognises a middle-ground between a conviction of murder and an acquittal—a verdict of manslaughter which is neither a jury compromise nor a verdict based on the provocation of the accused by the deceased.

Although the Australian cases are the most explicit articulations of this defence in British criminal jurisprudence, it has been judicially considered by several jurisdictions in the United States of America, particularly Missouri and Texas, and a terminological distinction has there been drawn between "perfect" and "imperfect" rights of self-defence.[8] Using this classification, some courts in these jurisdictions "apply the label 'perfect' if the defense, having resulted in homicide,

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1. *McKay* [1957] V.R. 560 at 561; [1957] A.L.R. 648 at 649.
2. Ibid.
3. See the writer's "The Slain Chicken Thief" (1958), 2 Sydney Law Review 414.
4. [1958] S.A.S.R. 95; 32 A.L.J.R. 213.
5. [1958] S.A.S.R. 95 at 122.
6. [1958] V.R. 363.
7. [1959] W.N. (N.S.W.) 550.
8. *Reed* v. *State* (1882) 1 Tex. App. 509; *State* v. *Painter* (1931) 329 Mo. 314, 44 S.W. 2d 79; *State* v. *Davidson* (1888) 95 Mo. 155, 8 S.W. 413; *Carver* v. *State* (1912) 67 Tex. Cr. R. 116, 148 S.W. 746; *State* v. *Partlow* (1886) 90 Mo. 608, 4 S.W. 14; *State* v. *Gordon* (1905) 191 Mo. 114, 125, 89 S.W. 1025, 1028; 1 Bishop, New Criminal Law, sections 836-877 (8th ed. 1892); R. M. Perkins, Criminal Law, pp. 903-909.

entitles the defender to an acquittal; and 'imperfect' if it merely reduces the grade of his offense to manslaughter".[9] It is however misleading analysis to refer to an "imperfect" right, if its exercise may lead to criminal liability. Nor is the concept of a "qualified or conditional privilege" any less infelicitous. Once the right or privilege of self-defence is insufficient to lead to the acquittal of one who has killed while purporting to exercise that right or privilege, no adjective can preserve the concept of right or privilege for purposes of determining whether the accused is guilty of murder or manslaughter. What we are in fact considering in such a case is a problem of mitigating circumstances akin to that of provocation. Here, as for provocation, it is proper to talk of a "qualified defence", not of a "qualified right or privilege."

Defined rights to protect himself by the use of force are accorded to one whose life or bodily safety is illegally threatened; likewise, force may lawfully be used to prevent the commission of a violent or atrocious crime and probably of any felony, to arrest a felon, to protect the bodily safety of third persons, and to protect property. All these various rights are classified and described with some precision in the extensive case law of the common law of crime; but the criminal liability of one who exceeds the limits of justification or excuse and in doing so kills has until recently been largely ignored. Is he a murderer? Or is he guilty only of manslaughter?

It is proposed to state the law on this issue and then to consider its historical antecedents, its foundation in authority, and its applicability to present social circumstances. As a preface, a statement of the facts and the decisions in *McKay* and *Howe* may serve to give reality to the problem we are facing. The following statements of the "facts" in these two cases are summaries of the respective accused's versions of the facts—for the purposes of legal analysis, their version is what matters.

Gordon William McKay, aged 27, lived with his wife and three children on a poultry farm belonging to his father. He earned his living as a postman but also assisted in running the poultry farm. For some time there had been persistent thefts of poultry, evidence being given that in the preceding three years one thousand chickens had been stolen. McKay had diligently tried to prevent these thefts and once had captured a chicken thief who, upon trial, was convicted and fined £10. To aid him in these efforts McKay had constructed a system of alarm bells on the doors of the fowl pens, which were arranged to ring in his house and to inform him of the presence of an intruder and, to a degree, where on the farm the intrusion was taking place.

At first light on the 9th September, 1956, an alarm rang in McKay's house. McKay took a .22 calibre repeating rifle, followed a path

9. R. M. Perkins, Criminal Law, 904.

between the pens to conceal himself, and reached a point about 140 feet from the intruder, whom he could see bending down looking into a fowl pen. McKay rested his rifle on the top strand of a wire fence. Then, in McKay's words to the police,—"I aimed the rifle at him to hit him between the hips and the feet and I fired. He turned and started to run and I fired a second time. When I fired a second time he dropped three fowls he was carrying but he didn't stop and I fired three more times. . . . I didn't think I would kill him, I only wanted to wound him". McKay told the police he did not call out or try to detain the intruder before he fired because he "didn't want him to get away", and, after the usual warning and on invitation to make a formal statement, said: "I will make a statement. I shot him and I meant to shoot him. He had no right to be stealing the fowls". Towards the end of the statement McKay said: "When I fired at this man, I aimed at him and I wanted to wound him but not to kill him. I consider I am entitled to wound a man who was stealing fowls on my property, especially when we have notices up 'Trespassers Prosecuted' ".

One of McKay's shots entered the thief's right lung, pierced the heart and killed him. Which of the shots was the lethal one was not established; it was probably not the first, and the trial judge seemed to think it was the last.[10]

McKay was tried for murder before Mr. Justice Barry of the Victorian Supreme Court who concluded his direction to the jury as follows:

> "If you think that the accused fired with the intention of killing the thief, and that at the time when he fired he was under the influence of resentment or a desire for revenge or a desire to punish the thief, then he is guilty of murder. If you think he was honestly exercising his legal right to prevent the escape of a man who had committed a felony and that the killing was unintentional but that the means which the prisoner used were far in excess of what was proper in the circumstances, then you should find him guilty of manslaughter. If, on some view of the facts which escapes me, you are able to say that the prisoner's conduct was reasonable and that death was an unintended consequence of the reasonable exercise of force shown while exercising a legal right, then it would be open to you to acquit the prisoner."[11]

McKay was convicted of manslaughter. Mr. Justice Barry's precise direction that excessive force used in protecting property, or preventing a felony, or arresting a felon, or a combination of these rights, should lead to a conviction of manslaughter and not murder was accepted by the Victorian Court of Criminal Appeal,[12] (Lowe, Dean and Smith

10. The trial judge ruled that, by virtue of s. 69 of the Crimes Act, 1928 (Vic.), the intruder was engaged upon a felony in stealing chickens.
11. Transcript at 78.
12. [1957] V.R. 560.

JJ.)[13] and special leave to appeal was subsequently refused by the High Court.

Whereas McKay on his own story overacted the role of captor, Howe also on his own version of the event overacted that of self-defender. In the High Court Mr. Justice Menzies succinctly stated Howe's version of the facts:

> ". . . Howe and Millard (the deceased) drove in Howe's car to a secluded spot about five miles away from Port Pirie to have a drink. After they had finished a bottle of sherry Millard pulled open the fly of Howe's trousers and touched his penis. Howe expostulated and told Millard to get out of the car. He did so and so did Howe and then without further dissension or discussion they walked together in front of the car and when they were eight or nine paces in front of the car Millard suddenly grabbed Howe by the shoulder. Howe wrenched himself free and ran back to the car and upon opening the door saw protruding from under the front seat the butt of a loaded pea rifle which he had put there but had forgotten for the time being. Seeing the rifle he seized it and shot Millard who was then standing eight or nine paces in front of the car with his back to Howe. Howe's further evidence was that he believed that the attacks both in and out of the car were sodomitical attacks by Millard, that Millard was somewhat taller and heavier than himself, that he didn't think he could keep him off with his hands, that he fired intending to stop further attacks and when he did so he was angry, and 'all mixed up', that he didn't think at all about whether he was likely to kill Millard and that it never occurred to him to get into the car and drive off.
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> Ross, J., did direct the jury that upon this evidence they could find manslaughter instead of murder on the ground of provocation but he gave no other direction about manslaughter. On the issue of self-defence, apart altogether from provocation, he instructed the jury that if the force used was excessive, i.e., greater than was necessary for mere defence, then the evidence afforded no defence at all. It is this direction that gives rise to the question now before this Court because the Full Court decided that it was wrong."[14]

The High Court unanimously agreed with the South Australian Court of Criminal Appeal that it was the trial judge's duty to direct the jury that if they believed Howe's story, but regarded the defensive force he had used as excessive, they should convict him of manslaughter.

In *Howe,* the Court of Criminal Appeal of South Australia (Mayo and Reed JJ and Piper A.J.) said:[15] "We have come to the conclusion that it is the law that a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder.'[16]

13. Mr. Justice Smith agreed with the trial judge's view of the law but dissented in its application to the facts.
14. (1958) 32 A.L.J.R. 218.
15. [1958] S.A.S.R. 95 at 121.

This statement of the law was approved by Dixon C.J., McTiernan, Fullagar and Menzies JJ. when it was tested on appeal to the High Court,[17] while one member of that court, Taylor J., formulated the law in wider terms than the South Australian Court of Criminal Appeal. Mr. Justice Taylor regarded it as "sufficient if it appears that what the accused did was done primarily for the purpose of defending himself against an aggressor and the jury should be instructed that unless satisfied beyond reasonable doubt that this was not so a verdict of manslaughter should be returned."[18]

The High Court of Australia and the Courts of Criminal Appeal of Victoria, South Australia, and New South Wales are therefore agreed that a person exercising rights of self-defence, the defence of others, the defence of property, the prevention of certain crimes or the arrest of a felon, who exceeds the rights accorded him by law and thereby kills should be convicted of manslaughter. They vary slightly in the phrasing of the relevant rule of law, and hence as to the terms in which the jury should be directed on this issue, but accept the propriety of such a verdict other than as a compromise verdict and other than as one based on a theory of provocation.

In some circumstances, therefore, one accused of murder may be entitled to an acquittal on the ground that he was properly exercising a right of self-defence, or of the defence of others, of the prevention of crime, the arrest of a felon, or the protection of property; failing this, he may yet have a qualified defence by which his crime may properly be reduced to manslaughter. In what circumstances will this qualified defence apply? It is the purpose of this article to search out an answer to that question; the problem will be considered under the following headings:

A. "Necessity" and "Proportion".

B. Authority for Self-Defence as a Qualified Defence.

16. The adverb "honestly" preceding "believes" in the above statement of the law is tautologous. One cannot have a dishonest belief. It may nevertheless, for purposes of directing a jury, be wise to use the phrase "honest belief" as assisting to negate any supposed right of the accused to use the occasion as a pretext. Cp. Sydney Law Review, Vol. 3, No. 1, March, 1959, at p. 178.
17. (1958) 32 A.L.J.R. 212.
18. (1958) 32 A.L.J.R. 212 at 217. Menzies J. suggested a formula closely akin' to that propounded in the Court of Criminal Appeal as follows: "it is manslaughter and not murder if the accused would have been entitled to acquittal on the ground of self-defence except for the fact that in honestly defending himself he used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant." (1958) 32 A.L.J.R. 212 at 221.

C. Limits of this Qualified Defence.

D. Onus and Burden of Proof.

E. The Qualified Defences.

F. The Social Wisdom of this Qualified Defence.

Observations concerning self-defence in this article are, in general, equally applicable to the defence of others, the prevention of crime, the arrest of the felon, and the protection of property.

A. "Necessity" and "Proportion"

During the latter half of the nineteenth century, contemporaneously with the gradual establishment of organised police forces in England and the gradual amelioration of the severity of criminal sanctions, two principles, probably first stated by East,[19] though based on then existing strands of authority,[20] gradually came to be regarded as essential to the existence of a justification or excuse on the ground of self-defence—the principle that the defensive act must be *reasonably necessary* to prevent the threatened criminal harm and the principle that the injury risked by the defensive act must be in *reasonable proportion* to that harm.

These two principles are but two aspects of one concept; that the accused must have acted under and within the necessity of the occasion. In 1879 the Criminal Code Commission (Lord Blackburn, Stephen, Lush and Barry JJ.) defined the fundamental principles governing these defences:

> "We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent."[21]

19. 1 P.C. 298.
20. See 1 Hawkins P.C., c. 28, s. 11, who formulates something like a doctrine of "necessity" when he writes that it is justifiable to kill the fleeing felon where "he cannot possibly be apprehended alive by those who pursue him". Hale, 1 *Pleas of the Crown* (3rd ed.) 494, speaks of such a justification where the felon "cannot be otherwise taken". East, 1 *Pleas of the Crown* 289, pursues the same line of analysis suggesting that if the felon could have been taken without such severity it is manslaughter at least. To similar effect, Foster, *Discourse on Homicide* 271; Blackstone, 4 *Comm.* 181-2, is on his own (and in error) in making the entire issue turn on whether the felon was or was not punishable capitally—"the law of England . . . will (not) suffer with inpunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death" (Blackstone's emphasis); this was and is only one weight in the balance of justification. The general concern of the law in this area is to prevent abuse of the occasion, and to scotch the notion that the felon is *caput lupinum*. Two early cases supporting this development are *Rex* v. *Mead & Belt* (1823) 1 Lew. 1846 and *Wright* v. *Court and Others* (1825) 4 B. & C. 596. In the former, Holroyd J. at the York Summer Assizes in 1823 directed the jury, in a case of this nature, that "if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder". In the latter, in an action of trespass and false imprisonment against a constable for using handcuffs in effecting an arrest, there was judgment for the plaintiff for lack of an agreement by the defendants that it was necessary to prevent the plaintiff's escape (or because he had previously attempted to escape) to handcuff him.

This balance "between means and end cannot be expected to possess mathematical exactitude."[22] Thus, in *Sikes* v. *Commonwealth*, Commissioner Stanley of the Court of Appeals of Kentucky said "Man-made law is not blind to human nature; at least to self-preservation. So one is not held accountable for taking the life of another in resistance to an attack which from its nature creates a reasonable apprehension of imminent danger of losing one's own life or of suffering great bodily harm. . . . But the person under attack is not required to measure the force necessary to protect himself with as much exactness as an apothecary would drugs on his scales. The measure is what in the exercise of a reasonable judgment under the circumstances is required to avert the danger. That is all the law demands."[23] Mr. Justice Holmes captured this benevolent understanding in the epigramatic observation, "Detached reflection cannot be demanded in the presence of an uplifted knife."[24]

"Necessity" and "proportion" are the guiding principles on which these defences, as absolute defences, rest; but they do not in themselves assist at all in finding an answer to the following question. Given that the accused must have acted, if he is to be acquitted, within and under the necessity of the occasion, is this to be tested

(a) on the facts as they were, that is to say, as the jury finds them to have been, or

(b) on the facts as the jury finds the accused reasonably believed them to be,[25] or

(c) on the facts as the jury finds the accused believed them to be?

It is clear that (a) is not the test for there is compelling authority that if the accused can show necessity for his conduct under (b) he will be acquitted even though if (a) were determinative he would be convicted.[26] Mistake of fact may be the foundation of a defence

21. Report of the Royal Commission on The Law Relating to Indictable Offences (1879) Cmd. 2345, p. 11. Barry J. made this passage the basis of his direction to the jury in *McKay*.
22. J. C. H. Wu, Fountain of Justice—A Study in the Natural Law, N.Y. 1955, p. 28.
23. (1947) 304 Ky. 429, 200 S.W. 2d 956.
24. *Brown* v. *United States* (1920) 256 U.S. 335 at 343.
25. This is often phrased "on the facts as the jury finds the accused reasonably and honestly believed them to be". As has previously been pointed out, see fn. 16, as a matter of logic this adds nothing to the statement in the text, but may nevertheless be a more meaningful phrase to use in directing a jury.
26. *Rose* (1884) 15 Cox C.C. 540, per Lopes, J.: *Griffin* (1871) 10 S.C.R. (N.S.W.) 91, particularly per Stephen, C.J. at 100; *Hewlett* (1858) 1 F. & F. 91, and see A. V. Dicey, Law of the Constitution (8 ed. 1920) 496 on this case; *Driscoll* (1841) C. & M. 214; *Deana* (1909) 2 Cr.App.R. 75; Beale, "Homicide in Self-Defence" (1903) 3 Col. L.R. 526, and the authorities cited 526, n.4. For Canadian authority see *Preston* (1953) 106 C.C.C. 135 and cases there cited by the Court of Appeal of British Columbia.

where the defence would be lacking on the facts as they were. Exceptionally, an accused would have a defence under test (a) where he lacks it under (b), and in such circumstances he should be convicted. Thus, in *Dadson*,[27] a constable observed one Waters carrying wood away from a copse and called on him to stop. Waters ran away. Dadson shot at and wounded him. Dadson was convicted of wounding with intent to do grievous bodily harm pursuant to a direction by Erle J. the effect of which was to deny him any justification for his felonious act. Waters' act was in fact felonious in that he had twice previously been convicted of stealing wood and by statute[28] such stealing after two previous summary convictions was a felony. However, these previous convictions of Waters were unknown to Dadson and, further, it was accepted that he did not know the different rules for arresting a felon and a misdemeanant. The Court for Crown Cases Reserved[29] agreed with the direction given by Erle J. and affirmed the conviction, saying, "The prisoner was not justified in firing at Waters, because the fact that Waters was commiting a felony was not known to the prisoner at the time." Here was a situation where the accused was justified on the facts as they were but not on the facts as he reasonably believed them to have been. Test (b) being regarded as determinative, he was rightly convicted.

Can the next step be taken, and test (c) substituted for (b)? Should the accused's alleged justification or excuse be based on the facts as he believed them to be even though a reasonable man placed as he was would not have reached that conclusion? There is some authority[30] and a growing body of opinion[31] favouring an affirmative answer, but at the present stage of the development of the law it would seem that the accused's belief must be an objectively reasonable one if it is to lead to a verdict in his favour. This involves the possibility of punishing a man because of his stupidity which alone may explain his failure to reason as would the average man placed as was the accused; but these are jury issues which we are considering and it may be unreal to expect of juries an understanding of these fine psychological distinctions and lacking in confidence in them if we fail to realise that they tend to reach broadly just conclusions ignoring such close analytic issues. At all events, the unreasonableness of the accused's alleged belief will be relevant and persuasive evidence that he did not have that belief; as a matter of judicial direction to the jury a summing-up in which they are directed to determine the accused's criminal liability on the facts as they find he reasonably believed them to be is

27. (1850) 2 Den. 35.
28. 7 & 8 Geo. IV, c. 29, s. 39.
29. Pollock C.B., Martin B., Wightman, Talfourd, Vaughan Williams, JJ.
30. *Wilson* v. *Inyang* [1951] 2 K.B. 399; *Bonnor* [1957] V.R. 227 at 253-4, per Barry J.; *Marshall* (1830) 1 Lew 76.
31. Glanville Williams "Mistake in Criminal Law" (1951) 14 Mod. L.R. 485; Glanville Williams "Criminal Law—The General Part" (1953) 168-171; J. Ll. J. Edwards "Mens Rea in Statutory Offences" (1955) 48-9.

unexceptionable. In seeking, therefore, to establish this qualified defence of self-defence, just as in seeking to establish a complete acquittal on the ground of self-defence, the accused is to be tried on the facts which the jury find he reasonably believed existed at the time of his alleged crime.

B. Authority for Self-Defence as a Qualified Defence

One may exceed rights of self-defence in a variety of ways. The occasion may be used as a mere pretext for carrying out a previously planned killing. The defensive force may be disproportionate to the threat. Force which started as defensive force may be continued long after the threat which called it forth is dispelled. A weapon may be used in defence where none was used by the assailant. Theatening words of gestures may call forth a violent assault. Indeed, necessary and proportionate defence develops gradually into excessive defence and then further merges into such a misuse of the occasion as to constitute no defence at all.

After considering the authorities for and against the rule in *Howe* and *McKay*, the limits of this rule (which involves drawing a line between excessive defensive force and aggression based on a mere pretext of defence) will be considered, but there is one form of excess which has received centuries of judicial attention which should now be discussed—the failure to retreat before using lethal defensive force.

It was not until the middle of the thirteenth century that the defences that the killing was *per infortunium* or *se defendendo* were of any effect whatsoever, and even then their effect was not on the conviction itself but only on the exercise of the Royal Prerogative of pardon.[32]

As the granting of pardons in these cases hardened into a practice, the procedure for their automatic grant required the jury to find that the death occurred *se defendendo* or *per infortuniam*. These defences came by virtue of the Statute of Gloucester in 1278[33] to form the basis of the law of excusable homicide. From the earliest days of the doctrine of *se defendendo*, first as a foundation for the favourable exercise of executive discretion and later as a finding by the jury, it seems to have been established that a man must not use lethal force in his own defence unless he can escape in no other way, and that as a matter of practical criminal administration he should be denied this defence if he could have retreated. Holdsworth refers to a case decided in the reign of Edward III which clearly illustrates the rigidity of this condition of the defence *se defendendo*. "At the gaol delivery at Newgate before Knivet and Lodel it was found by verdict that a chaplain

32. 2 Pollock & Maitland, History of English Law (2nd Ed., 1911) 479. The accused's chattels were, of course, forfeited despite the pardon and for centuries he was not protected from an Appeal of Felony at the suit of the deceased's family.
33. 6 Edward I c. 9.

killed a man se defendendo. And the Justices demanded to know how: and the jury said that the deceased pursued him with a stick and struck him; and the accused struck him again so that he died; and they said further that the accused could have fled from his assailant if he had wished. And the Justices adjudged him to be a felon, and said that he was bound to flee as far as he could to save his life."[34]

In the course of time the duty to retreat from an attack prior to using defensive force was held not to exist when a man was attacked in his own house (the "castle" doctrine)[35] or when attacked by robbers or burglars or arsonists. The denial of any duty to retreat when attacked by robbers, burglars or arsonists throws into relief the difficulties of historical analysis, for we have in making it in effect passed from excusable to justifiable homicides. The homicides classed as strictly justifiable—those carried out in the execution or advancement of public justice—have never involved criminal sanction. It is clear that before using otherwise authorised force, for example, in preventing a felony or arresting a felon, a man could not in the nature of things be expected to retreat. But frequently, in self-defensive situations, the killer would have been both protecting himself and preventing a felony—both under a duty to retreat and not under a duty to retreat; and hence a Statute of Henry VIII[36] was enacted to clear up this conflict and remove any supposed duty to retreat in such circumstances.

The confusion which later arose on this question of the duty to retreat is partly to be attributed to the fact that it became entangled with the rule in chance medley, by which one who had voluntarily engaged in a sudden affray could withdraw and, having indicated his intention to quit the affray by retreating "to the wall", would be excused the murder if he then killed an assailant.

The present rule as to retreat in English law is capable of precise statement as a general principle and does not now have to be set out as a series of narrow, sometimes conflicting, rules. We are, as Sir Owen Dixon phrased it, "no longer in an age of pedantic legal scholarship when dusty learning will operate to restrain or retard the process of displacing older and less familiar doctrine by generalizations from principles which appear applicable and are held in high esteem."[37] The principle is this—"the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."[38] It is a jury issue bearing on the central questions of

34. 3 Holdsworth, History of English Law (1st Ed.) 258.
35. *Hussey* (1924) 18 Cr. App. R. 160.
36. 24 Henry VIII c 5; 2 Pollock & Maitland, History of English Law 477 n.5.
37. The Development of the Law of Homicide, 9 A.L.J. Supp. 64 at 68.
38. Holmes J. in *Brown* v. *U.S.* (1920) 256 U.S. 335 at 343.

the necessity and proportion of the accused's conduct, but not determining these questions.[39]

It remains true of the application of this modern principle, as it was of the ancient rules, that an accused person may be convicted on a charge of murder because he failed to retreat from his assailant, and the question remains of practical importance whether, having failed to retreat prior to killing, when he is under a duty to retreat, he should be convicted of murder or manslaughter.

The above brief discussion of some of the ways of exceeding the rights of self-defence gives a clue to the reasons why no appellate courts in England or Australia, prior to *McKay*, had expressly considered the liability for such excess. The confusion in many situations between chance medley and excessive self-defence is obvious; the elimination of chance medley in *Semini*[40] tended towards isolating the problem of excessive self-defence. Likewise, provocation and excessive self-defence are frequently together involved in homicidal situations; the narrowing of the doctrine of provocation by such decisions as *Holmes* v. *Director of Public Prosecutions*,[41] *Mancini* v. *Director of Public Prosecutions*[42] and *Bedder* v. *Director of Public Prosecutions*[43] has diminished the frequency of confusion between provocation and self-defence in the jury's mind so that a verdict of manslaughter is less easily based on a confused mixture of the two defences. Finally, procedural reasons may be adduced for the delayed discussion of the legal effect of excessive self-defence. The extent of liability for such excess is a question that arises most naturally on an appeal against conviction for murder on the ground of alleged misdirection of the jury by the trial judge. There was no appeal in a criminal case until 1873[44] and not until late in the nineteenth century (in practice, early twentieth century) were directions to the jury transcribed so as to be capable of the precise scrutiny which alone ultimately compels this issue to be faced. It could, of course, have arisen long before (and as we shall see it probably was squarely decided in a considered judgment partaking of the nature of an appeal in 1640); but the existence of chance medley, the wider operation of provocation, and the previously limited rights of appeal together serve sufficiently to explain how a problem of such obvious practical importance and frequent occurrence should be still at large in the authorities.

39. On the retreat issue, see Beale, Retreat from a Murderous Assault, 16 Harv. L. Rev. 567; 3 Stephen, History of the Criminal Law of England, 59; and the note by Barry J. to *R.* v. *Newman* [1948] V.L.R. 61 at 69-71.
40. [1949] 1 K.B. 405; 1 All E.R. 233.
41. [1946] A.C. 588; 2 All E.R. 124.
42. [1942] A.C. 1; [1941] 3 All E.R. 272.
43. [1954] 1 W.L.R. 1119; 2 All E.R. 801.
44. Judicature Act, 1873, s. 47: "No appeal shall lie from any judgment of the High Court in any criminal cause or matter save in some error of law apparent upon the record". The summing-up does not form part of the "record". See *R.* v. *Hodgkinson* [1954] V.L.R. at 140 as to the meaning of "record".

Nevertheless substantial authority for this qualified defence of self-defence does exist and the Australian courts judiciously invoked some of that authority in defining this new rule in the law of homicide. The main English cases will be considered and then certain Australian, Canadian and United States authorities.

In 1640 Cook[45] was indicted for the murder of Marshal, a sheriff's officer. Marshal with others had come to Cook's home to arrest him pursuant to a warrant *capias ad satisfaciendum*. They hid all night in Cook's stable and in the morning approached his house and called on him to surrender to them, announcing that they held writs for his arrest. Cook refused to open the door and ordered them to depart. The sheriff's officers then broke a window and afterwards started to force the door, breaking a hinge in doing so. Cook then shot at Marshal, killing him. It was decided in the King's Bench that on these facts Cook was guilty of manslaughter and not of murder. All six judges of the court *seriatim* delivered their opinion that though Marshal, the sheriff's officer, was in these circumstances doing an unlawful act in breaking into Cook's home to execute a civil process and could therefore properly be resisted by force "yet they all held, that it was manslaughter: for he might have resisted him without killing him; and when he saw him and shot voluntarily at him, it was manslaughter".[46]

Scully[47] is a less compelling authority but it does lend some support to the rule applied in *Howe* and *McKay*. Before Baron Garrow at the Gloucester Assizes in April, 1824, Scully was indicted for manslaughter. Scully's confession was the only evidence against him. It was to the effect that he had seen a man standing "on his master's garden wall in the night, hailed him; and the man said to another, whom the prisoner could not see, 'Tom, why don't you fire?' That he (the prisoner) hailed them again, and the same person said, 'Shoot and be damned', whereupon he fired at the legs of the man on the wall, which he missed, and shot the deceased, whom he had not seen from his being behind the wall." Garrow B. directed the jury that "any person set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter."

For two reasons Baron Garrow's direction in *Scully* is a less secure foundation for the rule in *Howe* and *McKay* than is *Cook*. Firstly, Scully

45. (1640) Cro. Car. 537; 79 E.R. 1063.
46. Id. at 538.
47. (1824) 1. Car & P. 319; 171 E.R. 1213.

was indicted for manslaughter not murder. In that the prosecution lay within the discretion of the Crown, it is clear that this discretion extended to prosecuting for the lesser and included offence of manslaughter even if in law a murder conviction was proper. The question of excessive and lethal defensive force as creating liability for manslaughter and not for murder did not therefore necessarily arise.[48] Secondly, Baron Garrow's use of the word "rashly" in his direction to the jury might be thought to indicate his application of a theory of liability based on the accused's recklessness. The case does, nevertheless, support the *Howe-McKay* rule and it is submitted that if the facts in *Scully* recur the case should be decided on the basis of that rule.

The cases of *Whalley*[49] and *Patience*[50] expressly held that excessive and lethal force used to resist an unlawful arrest creates liability for manslaughter and not for murder.

Whalley was charged with various wounding and grievous bodily harm offences against Aston who sought to arrest him under a valid warrant, but which was unlawfully executed in that it was not addresed to Aston nor were the addressees present at the time of its attempted execution. Whalley's violent resistance to this unlawful arrest included biting off part of Aston's nose. In argument, Maule submitted for the prosecutor that "the prosecutor follows the prisoner, saying he has a warrant, which we must now take it that he had not, and is going to seize him; and the prisoner, before he is touched, strikes the prosecutor on the head with a stone. I submit, that a threat to commit an assault, or even a slight battery, would not justify this; and if the assault by the prisoner was not justifiable, and death had ensued, would not that have been murder?" To this, Williams J. replied, "I think, that, on the facts you have opened, if death had ensued, it would have been manslaughter only."[51]

Patience[52] was a similar case. The accused was indicted for wounding Beechey with intent to murder him. Beechey had sought to arrest Patience, but Beechey was not named in the warrant for Patience's arrest and the constable to whom it was addressed was neither actually nor constructively present which meant that the arrest was unlawful. Baron Parke directed the jury that "if a person receives illegal violence, and he resists that violence with anything he happens to have in his hand, and death ensue, that would be manslaughter."[53]

Odgers[54] raised the issue of failure to retreat prior to taking forceful measures of self-defence. Cresswell J. in directing the jury, said

48. Bull (1839) 9 Car & P 22; 173 E.R. 723) is a similar case to *Scully* in that Bull was indicted only for manslaughter even though the lethal force he used in his own defence was clearly grossly excessive to the threat he faced.
49. (1835) 7 Car & P. 245; 173 E.R. 108.
50. (1837) 8 Car & P 775; 173 E.R. 338.
51. (1835) 7 Car & P. at 250; 173 E.R. at 110.
52. (1837) 8 Car & P. 775; 173 E.R. 338.
53. Id. at 776.
54. (1843) 2 M. & Rob. 479; 174 E.R. 355.

"Now in order to render a case of homicide, committed with a deadly weapon, lawful on the ground of self-defence, it must appear that the party retreated as far as he possibly could, and then only used the weapon to avoid his own destruction. It is impossible to contend that the prisoner was so driven to use the scythe in this case; the offence would have amounted to manslaughter if death had ensued". From the context it is clear that Cresswell J. was not meaning by these words that it would be manslaughter *at least*, but was holding that in these circumstances the offence would be manslaughter and not murder.

At the Maidstone Assizes in 1879, one Weston was charged before Cockburn C.J. with murder.[55] Weston had shot at and killed the occasionally insane husband of the woman with whom he was living. The facts were complicated and uncertain; the Chief Justice took the then very unusual step of reducing his direction to the jury to writing, and directed that "if the prisoner fired the gun at the deceased really in anger, or intending to take the opportunity to be rid of him on account of his wife, it would be murder; but if the prisoner resorted to the gun in self-defence, against serious violence or in the reasonable dread of it, it would be justifiable, and that even if there was not such violence, or ground for the reasonable apprehension of it, yet that if the conduct of the deceased naturally led him to apprehend it and deprived him of his self-control, *or if an assault, though short of serious injury, was committed on the prisoner, then it would be manslaughter*".[56] A series of nine questions were then left to the jury in writing. Weston was convicted of manslaughter, not murder, and, although the jury's answers to the questions indicated confusion in their minds on the reasons for this decision, the Chief Justice's acceptance of this qualified defence of self-defence, where excessive and lethal force is used, is of significance.[57]

In *Symondson*[58] Sir Horace Avory prosecuting for the Crown adopted a similar view of the law. Like *Scully*[59] and *Bull*[60], *Symondson* was an indictment for manslaughter where, unless this excessive self-defence rule is good law, one would have expected the charge to be murder. In the course of his opening, Sir Horace Avory explained why the indictment was for manslaughter, and said that if threats were used to the accused which indicated an intention on the part of the

55. (1879) 14 Cox C.C. 346.
56. Id. at 351 (Italics added).
57. In a lengthy footnote, the reporter, W. F. Finlayson, seeks to explain the direction as being based on a theory of provocation and not of excessive self-defence. His explanation is unconvincing and is not easily reconciled with the plain words of the Chief Justice's carefully prepared direction. It is true, of course, that at this stage of the development of the common law of crime the qualified defence of provocation would have covered many of the situations to which, it is submitted, the qualified defence of excessive self-defence should have been applied.
58. (1896) 60 J.P. 645.
59. (1824) 1 Car & P 319; 171 E.R. 1213.
60. (1839) 9 Car & P. 22; 173 E.R. 723.

deceased to do him some bodily harm and he replied by shooting the deceased, that would be sufficient to reduce the crime to manslaughter.

Biggin[61] is a more recent English case giving strong support to the suggested rule. The facts were closely similar to those in *Howe*, Biggin alleging that he had killed one Gregory in protecting himself against a violent homosexual attack. Biggin was indicted upon a charge of murder and was convicted of manslaughter. He appealed to the Court of Criminal Appeal (Reading C.J., Avory and Sankey JJ.) on the ground that cross-examination contrary to the provisions of section 1 (f) of the Criminal Evidence Act, 1898, was improperly addressed to him. In delivering the judgment of the Court, the Earl of Reading C.J. said, "It is quite clear, as the learned judge said in his summing up to the jury, that if the appellant was really placed in the dilemma that Gregory would kill him unless he killed Gregory and that he made up his mind to kill Gregory and killed him, that would justify the jury in returning a verdict of not guilty. *The judge also directed the jury that if the appellant used more violence than was really necessary in the circumstances that would justify a verdict of manslaughter.*"[62] The judgment proceeded on other grounds but nowhere is exception taken by the Court of Criminal Appeal to this clear direction by the trial judge, Darling J., that excessive and lethal self-defence should in such circumstances create liability for manslaughter and not for murder.

Turning now to Australian decisions, it appears that in only one case prior to *McKay* does the *Howe-McKay* problem seem to have arisen. In 1871, *Griffin*[63] was decided by the Supreme Court of New South Wales (Stephen C.J. and Cheeke J., Hargrave J dissenting). Griffin had shot and killed a neighbour. "There had been quarrels between them . . . and on one occasion, a few days before the fatal occurrence, the deceased shot a pig belonging to the prisoner. The latter afterwards, under similar circumstances, shot a pig, the property of the deceased. On hearing of this act, the deceased—who was said to have been a man of most violent temper and habits — ran in a great passion, unarmed, but with his wife following him screaming out murder, towards the prisoner's house. The prisoner . . . was standing alone at his door, with a gun in his hand, used for fowling purposes; and he called out to the deceased to stop. The man did so, being then within a few yards of the door; when, in a moment, without further word on either side, the prisoner fired—as we must assume designedly, although possibly in alarm—and the shot eventually proved fatal. The defence was not, in fact, that the gun went off by accident. It was

61. [1920] 1 K.B. 213.
62. Id. at 219 (Italics added).
63. (1871) 10 S.C.R. (N.S.W.) 91.

submitted for the prisoner, that he had fired under a nervous but reasonable apprehension of danger."[64]

It was clear that on these facts a complete justification on the ground of self-defence was not available, nor was provocation present on the evidence. Nevertheless, it was the view of the majority of the court that a manslaughter verdict was open to the jury in these circumstances, and not as a mere compromise verdict. Like several of the English authorities quoted, the *Howe-McKay* rule is the only explanation of the decision even though the rule itself was not spelled out.

When we turn to North American decisions the position is more certain—the rule applied in *Howe* and *McKay* is expressly adopted in several jurisdictions. As we have seen, those jurisdictions in the United States of America which insist upon retreat as a precondition to justification on the ground of self-defence tend to reduce the crime to manslaughter when this requirement alone has not been met. Likewise, several jurisdictions, in particular Texas and Missouri,[65] have expressly held it to be manslaughter only to kill while exceeding the limits of an otherwise justified defence of oneself. *Commonwealth* v. *Beverly*[66] illustrates this. Like *McKay*, Beverly had lain in wait for and deliberately shot a chicken thief. The Supreme Court of Kentucky, on appeal, held that the trial judge "should have instructed that the jury might find the defendant guilty of voluntary manslaughter upon the idea that he had used more force than was necessary or reasonably necessary to prevent the commission of the felony described and to protect his property".

Canadian decisions are to like effect. In *Barilla*,[67] the Court of Appeal of British Columbia quashed a conviction of murder because of the trial judge's failure to direct the jury "that excessive self-defence would justify a manslaughter verdict".[68] The same court had in the decisions in 1950 in *Ouellette*[69] and in 1953 in *Nelson*[70] established this doctrine.

A recent case before the High Court of Justiciary, *McCluskey* v. *H.M. Advocate*[71] with facts similar to those in *Howe*, indicates that in Scotland verdicts of culpable homicide are accepted where the accused cannot be acquitted of murder because he has used "cruel excess" in defending himself.

64. Id. at 99.
65. See fn. 8 supra.
66. (1935) 237 Ky. 35.
67. [1944] 4 D.L.R. 344.
68. O'Halloran J. A., "Manslaughter was referred to in relation to provocation, and acquittal was referred to in relation to self-defence. But nowhere in the summing up did the learned Judge direct the jury upon manslaughter in relation to self-defence, that is to say, that excessive self-defence would justify a manslaughter verdict but not acquittal" (Id. at 345). . . . "The jury were not instructed that if they found that firing the revolver as Barilla did was an unnecessarily violent act of self-defence in the circumstances of the attack then launched, that it was open to them to find a verdict of manslaughter". (Id. at 347).
69. (1950) 98 C.C.C. 153.
70. (1953) 105 C.C.C. 333.
71. [1959] Scots Law Times 215.

There is thus an amplitude of authority to support the rule in *Howe* and *McKay*.

After stating, in *Howe*, that excessive and lethal self-defence should lead to a conviction of manslaughter, the Court of Criminal Appeal of South Australia continued, "We regard the situation which we have described as a case of unlawful killing, without malice aforethought, for although the killer may clearly intend to inflict grievous bodily harm on his assailant, and if necessary, to kill, his state of mind is not fully that required to constitute murder."[72]

It is submitted that the above analysis is not helpful. It is misleading in the same way as Viscount Simon's dictum in *Holmes* v. *Director of Public Prosecutions*[73], suggesting that provocation "negatives malice", is misleading and was in effect rejected by the Privy Council in *A-G for Ceylon* v. *Perera*.[74] It involves even more technicality than at present exists in the definition of "malice aforethought". McKay, Howe, and many of the other criminals whose cases have been considered above undoubtedly had the *mens rea* of murder when they killed; many clearly intended to kill. It is recognised, of course, that the same result is reached if after stating each type of mental intent (intent to kill, to inflict grievous bodily harm, to perform an act of violence in the course or in furtherance of a felony of violence, forcibly to resist arrest) which makes up that "malice aforethought" of unlawful killings which the law declares to be murder, a phrase is added, such as, "the accused not having certain limited rights to defend himself when holding this intent", but this does not lead to clarity of analysis. If the rule defined in *Howe* and in *McKay* applies not only to self-defence and the defence of property, but also to other situations such as preventing a felony, arresting a felon, protecting others (and, as will be submitted, also to other defences such as necessity and duress) it would seem sounder analysis to avoid adding yet more technicality to "malice aforethought" and preferable to recognise that a new qualified defence to a charge of murder has emerged.

So far only supporting authority has been discussed. What of authorities opposing the rule in *Howe* and *McKay*? Certain dicta in the judgment of the Lord Chancellor, Viscount Simon, in *Mancini*[75] appear to

72. [1958] S.A.S.R. 95 at 122.
73. [1946] A.C. 588 at 598; [1946] 2 All E.R. 124 at 127.
74. [1953] 2 W.L.R. 238. J. W. C. Turner comments on p. 155 of the 17th edition of Kenny's Criminal Law: "It was only in the ancient period when *malice aforethought* was an expression used to denote a calmly premeditated killing that it would be true to say that provocation negatived malice aforethought." See *Newman* [1948] V.L.R. at 69-71. In *Howe*, Taylor J. (32 A.L.J.R. at 217) seems to swing back to the old idea of "malice" indicating wicked and inexcusable intent.
75. [1942] A.C. 1.

stand in the way. It will be recalled that Mancini was convicted of the murder of Distleman, his story being that Distleman and Fletcher had attacked him (Distleman having a pen-knife in his hand) and that he had used his two-edged dagger-type knife in self-defence. Mancini's appeal to the House of Lords was based on the failure by the trial judge, Macnaghten J., to direct the jury on manslaughter. The Lords unanimously dismissed the appeal. Having rehearsed the facts of the killing, the Lord Chancellor said:

> "The main case set up on behalf of the appellant at the trial was self-defence, and the learned judge devoted the first portion of a very careful summing-up to this question. The appellant's counsel found no fault with this part of the judge's charge at all. It was in fact, if anything, too favourable to the appellant, for Macnaghten J. did not invite the jury to consider whether, even if it were true that the appellant was menaced with the pen-knife, that would justify the use of the appellant's terrible weapon so as to constitute a case of necessary self-defence, nor did the learned judge make any observations on the question whether the appellant could not have escaped from the threatened danger by retreating from the club. The learned judge was content that the jury should deal with the question of self-defence on the basis that, if they believed the appellant's story at the trial about Distleman advancing with the open pen-knife in his hand, they should return a verdict of 'not guilty'. The jury's verdict shows that they disbelieved the appellant's story. Self-defence by the use of so deadly a weapon could not be made out if the appellant was never threatened with the pen-knife. . . ."[76]

The appeal in *Mancini* concentrated on the question of provocation and its relationship with the rule in *Woolmington*,[77] mention also being made by Viscount Simon L.C. of "chance-medley".[78] What was not mentioned at Mancini's trial, nor in the Court of Criminal Appeal, nor in the House of Lords, was the possibility of a verdict of manslaughter on the plea of self-defence. This raises a substantial question of precedent—does the decision in *Mancini* involve a rejection by the House of Lords of a verdict of manslaughter where excessive and lethal defensive force has been used?

76. Id. at 6-7.
77. [1935] A.C. 462.
78. [1942] A.C. at 10. In facing this question it is proper to bear in mind the duty of the judge to direct the jury on any defences, whether put for the defence or not, which reasonably arise on the evidence. As Viscount Simon said in *Mancini* "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence, which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter". ([1942] A.C. at 7.)

This question was faced in *Howe* by Menzies J. in the High Court and by the Court of Criminal Appeal of South Australia. Menzies J. explained *Mancini* on this question as follows:[79]

> "The trial judge [in *Mancini*] did not direct the jury that the use of excessive force in the course of self-defence would warrant or require a verdict of manslaughter and it is now said that the fact that this was not treated as an omission shows that such a direction was not necessary. I cannot accept this contention. The judgment of the Lord Chancellor was based upon the assumption that the jury rejected the prisoner's story that he was attacked with a knife and that this rejection left nothing beyond the possibility of an attack with hand or fist. It was not argued for the prisoner that he killed with his knife in defending himself against such an attack; what was argued and what was rejected was that such an attack could amount to provocation for the killing. It would, I think, be quite unsafe to regard *Mancini's Case* in the way for which the Crown contended. The House of Lords was not dealing in any way with the problem that arises here."

The South Australian Court of Criminal Appeal[80] dealt with the problem of *Mancini* as follows:[81]

> "One explanation of the fact that neither Viscount Simon nor any of the Law Lords found it necessary to refer to the possibility of a verdict of manslaughter on the plea of self-defence, is that if Distleman (the deceased) did not have a knife in his hand, the fatal blow with the knife was struck in the course of a common brawl, and there was no basis for a submission that the blow was struck in reasonable apprehension of an unprovoked threat to life or limb, or in an attempt to prevent the commission of a violent and atrocious felony."

Of course, if the facts in *Mancini* recurred and if the rule enunciated in *Howe* and *McKay* is good law, defence counsel would doubtless argue that even if the accused was not justified on the grounds of self-defence (because he used a knife when the jury believed his assailants were not armed at all) and even if the accused's crime could not be reduced to manslaughter on the grounds of provocation (because the means he used were disproportionate to the provocation) yet he should be convicted only of manslaughter because he honestly and reasonably believed he was defending himself, even though he used disproportionate means in doing so. Surely, in *Mancini* the jury might have disbelieved Mancini's story that Distleman was armed with a pen-knife and yet believed Mancini when he said he thought he was being attacked and was in grave personal danger from Distleman and Fletcher. If so, then if *Howe* and *McKay* are correctly decided

79. 32 A.L.J.R. at 221.
80. Mayo and Reed JJ. and Piper A.J.
81. [1958] S.A.S.R. at 120-121.

the jury in *Mancini* should have been directed to determine whether Mancini honestly and reasonably believed himself to be the subject of an attack which might seriously injure him and, if that was his belief, to direct them to bring in a verdict of manslaughter.

This line of defence was not brought to the attention of the House of Lords in *Mancini* and had it been argued the case might have been differently decided; the failure of the Law Lords to advert to what was not argued before them cannot be used as binding authority for the non-existence of this line of defence.

C. Limits of this Qualified Defence.

Assuming that the decisions in *McKay* and *Howe* are sound law, there remains the difficult task of delimiting the circumstances in which the qualified defence of self-defence applies. The difficulty is to separate cases in which the accused should have the benefit of this qualified defence from cases where the killing was so divorced from the supposed defensive situation as to be entirely independent of it. At what point does this happen? What are the principles, what the formulae, which fix the point of operation of this qualified defence?

This is a problem which, under our system, is typically suited to being worked out gradually in its details in the case law. The operative principle was clearly stated by Hawkins:[82] "There must be no malice coloured under pretence of necessity: for wherever a person who kills another acts in truth upon malice and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder."

To give meaning to this principle of "malice coloured under pretence of necessity", of a mere pretext of self-defence cloaking a pre-existing intent to kill, it is necessary to distinguish between motive and intent.[82A] The accused may have hated the deceased for years, may rejoice in his death and feel his desire for revenge assuaged, yet if at the time of the killing he honestly faced a self-defensive situation he should be acquitted if he used proportional means of self-defence and convicted of manslaughter only if he did not. His motives are irrelevant to the decision if the killing was in fact causally related to self-defensive action. Nevertheless a consideration of the accused's motives may well assist in deciding whether he was indeed defending himself or whether it was a mere "pretence of necessity" concealing a premeditated killing.[83]

It is likely that as this qualified defence is further refined in the case law it will be found that temporal considerations are of significance. To call it forth, the jury must not disbelieve the accused

82. 1 P.C. (8th Ed.) 79.
82A. See G. E. M. Anscombe, Intention, Oxford 1958 at p. 18.
83. See Jerome Hall, Principles of Criminal Law (Indianapolis, 1947), pages 149-157 especially at 154.

when he says that he honestly and reasonably saw himself as in a self-defensive situation. They will be inclined to disbelieve him if there is evidence of prior planning by the accused to provoke the situation or if there is evidence of a substantial time-lag between the threat to the accused and his lethal action. They will tend to require, in Mr. Justice Holmes' phrase, that "a clear and present danger" faced the accused. The problem is, of course, close to that considered under the qualified defence of provocation—protracted delay in responding to the insult or threat will tend strongly to disprove the operative effect both of provocation and of self-defence.

The limits of this qualified defence of self-defence will be determined mainly by the facts of each case and it is unlikely that a rule more precise than Hawkins' "pretence of necessity" proposition can at present be formulated. In *Howe,* the Supreme Court of South Australia carefully confined their statement of the rule to the facts they faced and limited its operation to "a person who is subjected to a violent and felonious attack and who [killed] in endeavouring by way of self-defence to prevent the consummation of that attack.[84] Yet the same rule had been earlier applied in *McKay* where, though the accused was resisting a felony, no violence or threat of violence to the person was involved.

In argument in *Howe* counsel for the Crown submitted that on one view of this qualified defence "if a person threatened another with some comparatively harmless assault, such as a push or a slight knock, and the latter, in order to protect himself from the threatened assault, shot or knifed the former, he would be guilty of only manslaughter."[85] This argument was met by the Court of Criminal Appeal by confining the defence to situations "where there is a danger to life, or grave bodily injury is threatened, or death or such injury might reasonably be apprehended, or the commission of a forcible and atrocious crime is to be prevented; in other words, to cases where, if the force applied were not excessive, and death ensued, the homicide would be justifiable and no crime would be committed."[86]

On the appeal to the High Court in *Howe,* Mr. Justice Taylor was critical of the approach to this aspect of the qualified defence by the South Australian Court of Criminal Appeal and offered the following: "It is, in my view, sufficient if it appears that what the accused did was done primarily for the purpose of defending himself against an aggressor. . . ."[87]

84. [1958] S.A.S.R. 95 at 121-122.
85. Id. at 119.
86. Ibid. Mr. Justice Menzies' formulation of this qualified defence is on this point similar to that quoted above — see (1958) 32 A.L.J.R. at 221.
87. (1958) 32 A.L.J.R. at 217.

The essence of the matter is, in Mr. Justice Menzies' words, that any statement of the law on this qualified defence "would always leave open the question whether the person who killed was defending himself when he did so",[88] and this is inescapably a judgment which the jury must make based both on their view of the state of the accused's mind at the time of the killing and of the circumstances in which he was placed.[89]

D. Onus and Burden of Proof.

Since *Woolmington*[90] and *Chan Kau*[91] it is clear that, if the accused raises a real issue as to whether the killing was justified or excused on the ground that he acted in reasonable self-defence, the onus and burden of proof rests on the prosecution to disprove this defence beyond reasonable doubt for a conviction of murder. In *Bufalo*,[92] Sholl J., relying on these cases and on the decision in *McKay*, took the view that where the accused had raised a real issue of self-defence he should direct the jury not to convict of murder unless there was evidence upon which "the jury could make a positive finding that the accused was not acting in self-defence at all, or in other words that he caused the death by an act or acts not done for any genuine purpose of defending himself from injury but entirely for other purposes",[93] and, this evidence being lacking, he accordingly withdrew the possibility of a murder conviction from the jury and directed them to determine whether the accused acted within the limits of the doctrine of self-defence so as to be entitled to an acquittal.

On whom lies the onus and burden of proof of exceeding or not exceeding these limits? It is submitted that on general principles the answer is clear—once a real issue of self-defence has been raised

88. (1958) 32 A.L.J.R. at 221. Mr. Justice Menzies avoids one difficulty which can be seen in a comparison of the formulations of this defence offered by Mr. Justice Taylor in *Howe* and Mr. Justice Sholl in *Bufalo*. Mr. Justice Taylor refers to the defence applying if what the accused did was *primarily* for the purpose of defending himself (see the previous paragraph), while Mr. Justice Sholl directed the jury not to convict the accused of murder unless they found he was not acting in self-defence *at all* ([1958] V.R. 363).

89. One type of "excess" may be such as to exclude the qualified defence entirely. Suppose, in *McKay*, that McKay's first shot wounded the chicken thief in the leg. The thief falls. McKay walks up to him, sees him helpless on the ground, and shoots to kill. Whereas if he had killed the thief with the first bullet he is guilty of manslaughter, it seems that murder would be the proper verdict on the facts posited. It is possible on such facts to distinguish the first excessively defensive shot from the subsequent execution, and to regard the latter as not connected at all with self-defence or the defence of property. It would be another type of "malice coloured under pretence of necessity". It may well be that any type of sadistic or cruel "excess" may have a similar result.

90. [1935] A.C. 462.

91. [1955] A.C. 206; [1955] 2 W.L.R. 192.

92. [1958] V.R. 363.

93. Id. 364.

on the evidence by the defence, the prosecution will have to establish beyond reasonable doubt

(a) for a conviction of murder, that the accused was not acting in self-defence *at all*, or

(b) for a conviction of manslaughter, that the accused, though acting in self-defence, exceeded the limits of self-defence as regards the means or force he used.

It may be of assistance to compare these submissions with the relevant rules in civil actions where excessive self-defensive measures causing injury are in issue. A recent Canadian case, *Miska* v. *Sivec*[94] before the Ontario Court of Appeal (Aylesworth, Le Bel and Morden JJ.A.), raised this question in precise form. The plaintiff pleaded that when he entered the defendant's premises he was, without cause, shot by the defendant and as a result suffered injuries involving the loss of one leg. The defendant pleaded self-defence. The trial judge directed the jury that the burden of proof was on the defendant to show that the force used in his self-defence was not more than was reasonably necessary for the purpose. The jury found for the plaintiff: the defendant appealed on the ground, *inter alia*, that the trial judge had misdirected the jury in telling them that the burden of disproving that he used excessive force lay on the defence.

It was argued for the defendant-appellant that the onus of satisfying the jury that he acted in self-defence lay on the defendant but that, if they found self-defence, the onus then shifted to the plaintiff to satisfy the jury that the force used by the defendant was excessive or unreasonable in the circumstances. Under strict common law rules of pleading there was considerable support for this argument.[95] In 1855, however, in *Dean* v. *Taylor*[96] the Court of Exchequer[97] held that since the Common Law Procedure Act, 1852,[98] a mere joinder of issue without plea of excess was sufficient. The Ontario Court of Appeal relied on *Dean* v. *Taylor* as denying the authority and relevance of the earlier authorities on common law pleadings on the issue they faced and concluded: "Self-defence is an answer to a claim for assault but only when the force used was not unreasonable in the circumstances. The reasonableness of the force is an integral part of the defence and, in my opinion, must be established by a defendant. . . . The defendant's plea, as here, was in effect a confession and avoidance, and the burden was on him to prove all the justifying circumstances one of which

94. [1959] 18 D.L.R. (2d) 363.

95. *Rimmer* v. *Rimmer* (1867) 16 L.T. N.S. 238; *Penn* v. *Ward* (1835) 2 C. M. & W. 338; 150 E.R. 146; *Oakes* v. *Wood* (1837) 2 M.&W. 791; 150 E.R. 977.

96. 11 Exch. 67; 156 E.R. 748.

97. Pollock C.B. and Parke and Martin BB.

98. 15 & 16 Vic. c. 76.

was that the force used was reasonable in the circumstances." They therefore dismissed the appeal.

This is an unsatisfactory decision. In Australia, in *McClelland* v. *Symons*,[99] the plaintiff alleged that the defendant had injured him with a crowbar, the defendant pleaded self-defence, and the plaintiff replied that if the defendant had been exercising rights of self-defence he had used excessive force in doing so. Sholl J. held, after an exhaustive analysis of the authorities,[100] that it lay on the plaintiff, if he were to succeed in his reply, to prove the excess of which he complained.[101]

The conflict between the rules enunciated in *Miska* v. *Sivec* and *McClelland* v. *Symons* raises a further doubt as to the relevant rules in civil cases. If excess is proved by the plaintiff (*McClelland* v. *Symons*) or not disproved by the defendant (*Miska* v. *Sivec*) is the defendant liable in damages only for the injury caused to the plaintiff by the *excess* or for the injury caused by *all* the defensive force he has used? There is surprisingly little authority on this question, possibly because the injuries suffered are rarely divisible into those which were justified and those which were not.

In *Kohan* v. *Stanbridge*[102] Pring J. of the New South Wales Supreme Court regarded the defendant as liable in damages only in respect of the injury flowing from the excessive violence used by the defendant and not for the total injury he had caused. No English case[103] seems to have raised this issue squarely, nor is it discussed in the leading English commentaries. American decisions and commentaries strongly incline, however, to agree with Pring J. that any excessive force used by the defendant renders him liable only for the excess[104] and it is thus possible for each to have an action against the other.[105] Fleming[106] accepts *Kohan* v. *Stanbridge* as the determinative authority for Australia.

If, as seems to be the law, the defendant is liable only for the excessive defensive force he has used against the plaintiff, this would, as a matter of convenient trial practice, accord better with the rule in *McClelland* v. *Symons* than with that enunciated in *Miska* v. *Sivec*, and it is therefore submitted that in criminal and civil cases the issue of justification by self-defence will (though

99. [1951] V.L.R. 157.
100. *Penn* v. *Ward* (1835) 2 C. M.&R. 338; *Kavanagh* v. *Gudge* (1844) 7 Man. & G. 316; *Dean* v. *Taylor* (1855) 11 Ex. 68; *Rimmer* v. *Rimmer* (1867) 16 L.T.N.S. 238; *Hemmings* v. *Stoke Poges Golf Club Ltd.* [1920] 1 K.B. 720.
101. For the standard of proof applicable in such a case see *Helton* v. *Allen* (1940) 63 C.L.R. 691.
102. (1916) 16 S.R. N.S.W. 576 at 584.
103. See the extensive list noted in Halsbury (2nd Ed.) Vol. 33 at pages 36 & 37.
104. Harper & James The Law of Torts, Vol. 1, p. 241; Prosser, Law of Torts, 2nd Ed., p. 89; Restatement, Vol. IV, p. 480.
105. *Dole* v. *Erskine* (1857) 35 N.H. 503, per Erskine J. at 511.
106. Law of Torts, p. 98.

the burden of proof differs[107]) in the first instance require this justification to be raised by the defence and, if there is evidence of self-defence sufficient to raise a "real issue", the onus and burden of proof will then rest on the prosecution or plaintiff to establish either no justification on this ground or that the justification was exceeded.

Before leaving this comparison between self-defence as a justification for otherwise criminal conduct and for otherwise tortious conduct, the following comment supporting the rule in *McKay* and *Howe* by analogy with civil cases is appropriate. Just as it has been found necessary, if justice is to be achieved, to carve out in civil cases a middle ground between complete justification by self-defence and no such justification (that is, liability only for the injury caused by excessive force used in self-defence), so it is desirable to carve out a middle ground between acquittal and murder in cases of homicide where excessive and lethal defensive force has been used (that is, liability for manslaughter).

E. The Qualified Defences.

The contribution that the Australian courts have made to the development of the criminal law in the cases we have discussed will be of even more importance if, as will now be suggested, the range of the "qualified defences" extends beyond those types of situations canvassed in *McKay* and *Howe*. The "excessive and lethal force equals manslaughter" rule applies to self-defence, the defence of others, and the defence of property. It applies also, it is submitted, to excessive and lethal force used in preventing crime or arresting criminals. Nor does this exhaust the list of "qualified defences" to a charge of murder.

Provocation is, of course, such a qualified defence. Its limits have been defined in an extensive case law and the courts are constantly deciding cases in which it is of central importance. It is the concession which the law properly makes to human frailty. The situations which the law regards as technically provocative are those in which, though the accused's lethal action is to be condemned as felonious, he yet acted under stress which might move an average man, placed as he was, to extreme rage. We mitigate guilt and punishment because of an appreciation of the weakness of human nature in situations where the threat of a conviction of murder seems unlikely to deter any more than the threat of a conviction of manslaughter, and because it would be contrary to the popular sense of justice to convict and punish for murder.[107A]

107. In Queensland and possibly in Western Australia the burden of proof in these types of criminal and civil matters is apparently identical; see *Orgliasso* v. *Vitale* [1952] S.R. Queensland 211.
107A. See "The Defence of Provocation" by Mr. Justice Barry, 4 Res Judicatae 129 at 132; *Packett* v. *The King* (1937) 58 C.L.R. at p. 217 per Dixon J.

It is submitted that these same principles of mitigation of punishment are applicable to excessive and lethal force used under duress or necessity.

Under certain circumstances an accused person has a defence of duress or coercion. There is authority that this defence does not apply to murder,[108] but the possibility that in such cases the proper verdict is manslaughter and not murder has received little consideration. A recent Criminal Code has, however, incorporated this idea. The Wisconsin Criminal Code, 1955, provides by section 939.46 that:

> "A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him to act is a defense to a prosecution for any crime based on that act *except that if the prosecution is for murder the degree of the crime is reduced to manslaughter.*"[109]

It is submitted that the law should mitigate the penalty when the accused was subjected to genuine coercive pressure which threatened his life or bodily security, or that of his family, when he killed. Although one who under duress takes the life of an innocent person is (as the law stands) not guiltless, he nevertheless does not manifest the same degree of homicidal wickedness as the murderer. The deterrent force of the law would not be weakened by such a result and a conviction of manslaughter better expresses the extent of guilt than does a conviction of murder.[110] There is no case law supporting this result nor is there any opposing it. The reasoning in *Howe* and *McKay* and the cases we have considered on that doctrine do, however, lend support to the acceptance of this qualified defence of coercion or duress in murder cases.

The Wisconsin Criminal Code of 1955 has a similar provision concerning a qualified defence of necessity. Section 939-47 provides:

> "Pressure of natural physical forces which causes the actor reasonably to believe that his act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to himself or another and which causes him so to act, is a defense to a prosecution for any crime based on that act *except that if the prosecution is for murder the degree of the crime is reduced to manslaughter.*[111]

The two main cases in Anglo-American law in which the defence of necessity has been considered in homicide cases are *U.S.* v. *Holmes*[112] and *Regina* v. *Dudley & Stephens*.[113] In the former, it will be recalled, the charge was manslaughter and not murder. This charge can only be explained on the theory that the prosecution viewed Holmes' crime as of lesser guilt than the crime of murder and saw him in effect as having a qualified defence of necessity. Holmes was convicted, sentenced to six months imprisonment, but even this relatively brief term was remitted shortly after sentence.

In *Dudley & Stephens* the charge and conviction was for murder. But the prisoners were reprieved and served only a term of six months imprisonment. The relationship between the capital sentence and the clement penalty actually imposed reveals the gap in our legal analysis which should properly be filled by allowing a qualified defence of necessity in those exceptional homicides where it may be relevant. Again, though case law explicitly supporting this result is lacking, it is nowhere rejected by authority, and it accords both with principle and social utility.

There was no doubt that Holmes, Dudley and Stephens intended to kill; an extensive legal literature[114] has developed around the question whether they ought to have been acquitted, with the majority of informed opinion rejecting an acquittal but none supporting more severe punishment for them than was actually served—and the sentences served were appropriate to convictions for manslaughter, not murder. Holmes, Dudley, and Stephens faced a situation of necessity; their lethal acts exceeded what the situation permitted; they were manslaughterers, not murderers. It may indeed be desirable, as Lord Coleridge suggested in *Dudley and Stephens*, for the law "to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy";[115] but it is hard to see a reason for declaring a failure to achieve these standards to be murder when a manslaughter conviction achieves the law's affirmation of social principles, preserves what marginal deterrence might be thought to reside in a criminal sanction for this type of conduct, and better accords with our view of the moral guilt of those who weaken under the most extreme temptation.

F. The Social Wisdom of this Qualified Defence

It has been suggested that this new qualified defence is a "Gangster's Charter"; that it lessens the deterrent force of the law of homicide at a time when it needs strengthening, not weakening by spurious defences; that it encourages fake defences which are difficult to disprove;

108. *Steane* [1947] K.B. 997; [1947] 1 All E.R. 813; Hale 1 P.C. 51; Blackstone, 4 Comm. 30; the English Criminal Law Commissioners of 1833 and the Draft Code of 1879; and the Codes of Canada (s. 17), New Zealand (1908, s. 44 & Crimes Bill, 1959, s. 31) Queensland (s. 31), Western Australia (s. 31) and Tasmania (s. 20).

109. Italics added.

110. The same reasoning would apply to a defence of coverture in jurisdictions preserving that defence.

111. Italics added.

112. (1842) 26 Fed. Cases No. 15, 383.

113. (1884) L.R. 14 Q.B.D. 273.

114. See, for example, Glanville Williams, Criminal Law—The General Part, Ch. 17; Jerome Hall, Principles of Criminal Law, Ch. 12; "The Case of the Speluncean Explorers" 62 Harv. L.R. 616.

115. (1884) L.R. 14 Q.B.D. at 288.

and that it greatly complicates the task of the jury and of the trial judge. These amount to severe criticisms which cannot lightly be brushed aside. They involve, however, not the morality of this qualified defence but rather its applicability under our system of trial. Whenever self-defence as an absolute or qualified defence is pleaded (and, if the defence arises on the facts, even if not pleaded), the judge will have to direct the jury at both levels—on the absolute and on the qualified defence—as well as on any other defences which may have arisen in the trial. And to reject this qualified defence the jury will have to be satisfied beyond reasonable doubt that the accused did not reasonably think himself to be exercising any rights of self-defence and that he was not merely using the occasion as a pretext for a planned killing.

As a moral issue it is clear that one who kills while abusing a legal right of self-defence but who, not unreasonably, sees himself as defending himself, is much less guilty than the killer lacking this excuse. The moral distinction between them is substantial and should properly be reflected in the crimes for which they are to be convicted, particularly when, lacking executive intervention, the penalty for murder is fixed and incapable of judicial gradation in accordance with moral fault or social need.

Likewise, if our purposes are primarily deterrent, it is wise to reserve our major condemnation and punishment, our most deterrent sanction—the conviction and punishment for murder—for those killings which are planned by the accused and for which he cannot reasonably see any justification.

Cases like *McKay* itself underline the need for the availability of a conviction for this lesser crime. McKay clearly and grossly exceeded the necessity of the occasion judged on the facts as he saw them; he should not be acquitted. On the other hand it exaggerates his wickedness to call him a murderer. When McKay was convicted of manslaughter and sentenced to three years' imprisonment there was an outcry in the press based, it is true, on ignorance and sentimentality, but indicating at least a deep social resistance to regarding him as a murderer.[116] On appeal to the Court of Criminal Appeal the sentence of three years, imposed on him for manslaughter, was reduced to eighteen months. Five days after the rejection by the High Court of McKay's application for special leave to appeal, the Attorney-General announced the decision of the Governor-in-Council to release McKay immediately, so that he spent a total of three months in custody. It would be folly for the law to compel jurymen to choose between a conviction for murder and a complete acquittal in such a case as *McKay*.

The facts in *Howe* are so profoundly different from those in *McKay* that there is a tendency to fail to perceive that the legal problem is the same—the criminal liability for the use of excessive and lethal defensive force. Assuming that a strong case can be made for the existence of this qualified defence in *McKay*, can the same be done in *Howe*? It is submitted that there is only one obstacle in the way of our ready acceptance of this defence in cases like *Howe*. This is that we find it hard to believe that Howe (and the others who have told and will tell similar stories) was really defending himself at all. We suspect him of killing for the money he in fact stole from the deceased, or we suspect other equally unattractive motivations. Because of our doubt of the truth of Howe's statement, that he was attacked homosexually by a larger man and protected himself with the loaded rifle he chanced to have near at hand, there is a tendency to reject a qualified defence based on that statement, especially when we appreciate that the jury must disbelieve Howe's statement beyond reasonable doubt before they can convict him of murder. But it would be the course of confusion to establish undesirable rules of law because we do not trust the jury to apply desirable ones.

Nor is anything really lost in the deterrent force of the criminal law by allowing juries, and directing them upon, this middle ground. If a jury convicts of manslaughter because of doubt as to whether the accused was or was not defending himself at all, it is unlikely that in jurisdictions preserving capital punishment the accused would be executed if he were convicted of murder. The punishment for manslaughter in most jurisdictions gives the judge the widest discretion in sentencing, including the power to impose protracted periods of imprisonment. Judges will have no difficulty in expressing by the form and severity of sentence their view of the gravity of the offence, whereas if the only choice is between murder and acquittal either excessive or no punishment will frequently occur.

It is not true to say that the doctrine of provocation and the jury's right to bring in a compromise verdict of manslaughter (even when not directed on manslaughter) together avoid any difficulties flowing from the absence of a qualified defence of self-defence. Again, we cannot base a just and effective system of criminal law on a foundation of reliance on the irrationality of juries, for there is no reason to doubt that, in the broad, juries struggle to follow judicial directions on the law. And provocation, certainly as enunciated in *Mancini*, is frequently absent in the excessive self-defence situations; it was lacking in *McKay*.

Finally, it is a mistake to assume that the existence of such a qualified defence will always favour accused persons. It may have the contrary effect. It may well be less of a "Gangster's Charter" than a wise technique whereby wrongdoers, who would otherwise have been acquitted,

116. See "The Slain Chicken Thief" (1958) 2 Syd. L.R. 414 at pp. 432-435.

are convicted of manslaughter,[117] and thus may help to affirm in the criminal law that reverence for life which is the fundamental requirement of a civilized community.

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117. In *Mraz* (1955) 93 C.L.R. 493, the High Court reversed the New South Wales Court of Criminal Appeal precisely because the accused was convicted of manslaughter pursuant to a judicial direction leaving open this possibility in a case where manslaughter was *not* open on the evidence. It was central to the High Court's reasoning that an accused person may very well be more likely to be convicted when the choice facing a jury is between murder or manslaughter or acquittal than when their choice is between murder or acquittal, as it should have been in *Mraz*.