A PLEA OF SELF-DEFENCE RESULTING IN MANSLAUGHTER

GRAHAM E. PARKER*

It has recently been observed[1] that the law relating to homicide in Australia is, by a process of evolution, departing from its English counterpart. This has manifested itself in particular in relation to constructive homicide[2] and manslaughter.

It would appear that this divergence from the imported common law is not limited to questions of *mens rea* or restricted to the attitudes of Australian lawyers and judges.

A recent case[3] decided by the Rhodesia and Nyasaland Federal Supreme Court has applied a qualified defence to murder which, although deducible from the common law of England in the nineteenth century, has been more strictly recognized and implemented in Africa, Australia and Canada. This country, however, was one of the first British countries to recognize the defence of excessive self-defence in the criminal law of the twentieth century.

By virtue of Section 18 of the Penal Code of Nyasaland, the law which regulates a case where self-defence is raised is the law of England. It is significant that the court should have seen fit to give the broadest meaning to the term "English Law". It was to the credit of the court that it should have treated the common law for the purpose of Nyasaland and Rhodesia as the common law of the Commonwealth. The primary authorities relied upon were cases other than those decided in England; some nineteenth century English cases were referred to but two twentieth century ones were distinguished. The greatest support for the decision reached in *R.* v. *Jackson* was gained, however, from cases decided in the Commonwealth at large.

The accused was charged with murder and was convicted of that crime by a judge who had been assisted in preliminary hearings by assessors.[4] Jackson had killed his wife's grandfather. He had had a minor quarrel with the decreased, and some time after this altercation, the deceased had come to the home of the accused and had attacked him with his fist, knocking Jackson to the ground. As the accused was recovering himself the deceased renewed the attack. Jackson seized a hoe which was lying nearby; he thought that the instrument which he grabbed in haste was a stick. The deceased was hit on the head three times and died as a result of the injuries he received.[5]

The trial judge had said that looking at the evidence in the most generous terms he was unable to find any measure of justification which would be sufficient to reduce the offence from murder to manslaughter.

---

*LL.M. (Adel.), Barrister and Solicitor of the Supreme Court of South Australia. Visiting Lecturer in the Faculty of Law, University of British Columbia.

1 Howard, *An Australian Letter*, [1962] Crim. L. Rev. 435.

2 *R.* v. *Smyth* (1957) 98 C.L.R. 163. See also Morris & Travers, *Smith* v. *Smyth* (1961) 35 Aust. L.J. 154.

3 *R.* v. *Jackson* [1962] R. & N. 157.

4 As to a similar procedure which is followed in West Africa, see Macaulay, [1960] Crim. L. Rev. 748, 825.

5 The evidence of the accused's wife was not favourable to him and was largely discounted by the Federal Supreme Court. In particular, see [1962] R. & N. 157, 159-160. She had claimed that the deceased had been hit when lying on the ground.

It was claimed on appeal that the accused had been prejudiced because the judge had misdirected himself, that he had not taken into account the fact that the accused could be acquitted on one view of the facts, or alternatively that the actions of the accused in defending himself must raise the question whether he could be excused to the extent of being convicted of manslaughter.

The Federal Supreme Court allowed the appeal, substituting a verdict of manslaughter. The basis for this decision was that Jackson had a right to self-defence in the circumstances but had exceeded his right, and therefore, was guilty of the intermediate crime of manslaughter.

EARLY CONCEPTIONS OF SELF-DEFENCE

Self-defence—used as a term incorporating defence of oneself, as well as defence of others and of property—is one of the oldest justifications known in the criminal law of homicide.[6]

There has been great confusion in the past as to the exact meaning of the terms which are commonly used in the criminal law today. It is necessary that these terms should be examined to discover, if possible, why these terms should have become so confused.

Some difficulties still exist today; not the least of these is the lack of precision which is implicit in the term 'manslaughter'. Similarly, it is said that there is a significant difference between excusable and justifiable homicides which result from successful defences of self-defence. It is submitted that these categories are unnecessary and only lead to further confusion. The distinction is based on the retreat rule which has lost much of its importance in modern criminal legal theory.

Hale and Hawkins divided homicides *ex necessitate* into those of a private or of a public nature. The latter was taken to refer to killings in the course of public justice, in the apprehension of criminals (and particularly felons) or in cases involving major disturbances of the public peace.[7]

Under the head of private defences within the scope of homicide *ex necessitate,* Hale grouped defence of one's life, the life of another, safeguard of goods, and measures which a man could take in defence of his house or habitation.

Of the first, *se defendendo,* Hale describes two types: first, that which excuses from death but not from forfeiture of goods, with the

---

[6] In the law of Edward 1, the only killing which could be justified were those done in execution of the King's writ or by customary authority which allowed a thief, an outlaw, or possibly, "other manifest felon" to be killed. Other killings, by misadventure or in necessary self-defence resulted in 'a conviction' although the defendant 'deserved but needed a pardon'—the basic difference being that these killings were not done in execution of the law. These killings as well as those resulting from feuds and private warfare, were strongly policed by the King's courts who demanded the necessary forfeiture. There was the 'equitable' relief of the writ *de odio et atia* but this gave way to the operation of the provisions of the Statute of Gloucester. The royal pardon was still required, although it was dispensed by the Chancellor.

The Statute 24 Henry 8 c. 5 abolished forfeiture in cases of necessary self-defence and from that time a pardon became a matter of course.

For elaboration, see 2 Pollock and Maitland, *History of the English Law before the Time of Edward* 1., 477 *et seq.* (1895); Beale, *"Retreat from a Murderous Assault"* (1903) 16 Harv. L. Rev. 576; Brown, *Self-Defence in Homicide from Strict Liability to Complete Exculpation,* [1958] Crim. L. Rev. 583.

[7] They would also include the apprehension of gaol escapees. See 1 Hawkins, *Pleas of the Crown,* chapter 11, (8th ed. Curwood 1824), cited hereafter as *Hawkins P.C.,* generally, 1 Hale, *Pleas of the Crown* chapter 41 (Wilson ed. 1778), cited hereafter as *Hale P.C.*

party killing in need of a pardon. The second type is one which could wholly acquit from all kinds of forfeiture.

Hale[8] enumerated those killings which would not involve any forfeiture and for which the person killing was absolutely acquitted. Such killings were described as ones in which the homicide "can by no means be attributed to the act of the person, but to the act of him that is killed".

The specific killings envisaged were as follow: 1. of a thief who attempts to rob. 2. of a person who attempts to rob or kill in or near the highway or in the mansion of the killer, although the person is not a successful robber. 3. of a person who tries wilfully to fire the house, or to commit burglary although he has not actually done so. 4. of a person who assaults an officer or bailiff in the execution of his office. 5. of a person who assaults a constable who tries to suppress an affray. 6. of a person who resists or flies. 7. of a person engaged in a riot. It can be seen at this stage that the category once known as justifiable homicide, and usually referring to public offences, had been encroached upon to some extent by the provisions of the Statute of Henry 8.

Hawkins had also described the circumstances in which a man could claim full exculpation for a homicide; he included the killing of a man who assaulted another in the highway, or in a house with intent to rob or kill. He extended this protection to the intervention by any member of a family or the servant or lodger of the man attacked.

Both of these classifications tend to show that the categories of public and private defences were confused, or at least overlapping. This was a natural happening if a private person was concerned and had to contend with a felon. Hale had said that if a person killing was attacked in a manner which was imminently dangerous to life (or impliedly so from 1, 2 or 3 above) or if a violent felonious attack was made on a person or property, the killing was justifiable.

Hawkins said a killing was described as excusable homicide, and *se defendendo* when it:

> . . . seems to be where one has no other possible means of preserving his life from one who combats with him on a sudden quarrel or of defending his person from one who attempts to beat him (especially if such attempts being made upon him in his own house), kills the person by whom he has been reduced to such an inevitable necessity.[9]

And yet Hawkins added later that *se defendendo* is supposed to be done on some quarrel or affray and that:

> . . . from whence it seems reasonable to conclude that where the law judges a man guilty of homicide *se defendendo* there must be some precedent quarrel in which both parties always are, or at least may justifiably be supposed to have been, in some fault . . .[10]

These two statements alone show a confusion which emphasizes the various meanings which were given to *se defendendo*. This is unfortunate because it has led to further confusion between self-defence and related defences and mitigations.

Foster's statement of self-defence was a more exact one. He complained of "the darkness and confusion upon this part of the law", and that it had not been treated "with due precision".[11]

8 1 *Hale P.C.* c. 41.
9 1 *Hawkins P.C.* 85, c. 10 s. 13.
10 1 *Hawkins P.C.* c. 28. s. 24.
11 Foster, *Crown Law.*, 273. (3rd ed., Dodson, 1809).

Of justifiable self-defence, he said "the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours by violence or surprise to commit a known felony upon either. In these cases, he is not obliged to retreat but may pursue his adversary till he finds himself out of danger".[12]

Although the phrase "by violence" in Foster's treatise limits the scope of the problem to a great extent, the question still remains of discovering the exact meaning of a "known felony". In a later extract he says "where a known felony is attempted against the person *be it to rob or murder,* here the party assaulted may repel force by force".[13]

When Foster wrote his commentaries, pardons were becoming automatic and he was attempting, as had Hale, to correct the absurdity of the law in allowing absolutely the killing of the person committing a felony against another, but not justifying a felony committed against one's own person, house, or property, which killings was merely excusable. This was based of course upon the dichotomy of lawful homicides of a public and of a private nature.

It is submitted that this was not a revolutionary step by Foster when one considers the wording of the Statute of Henry 8.

An eminent criminal lawyer, Professor Beale, has criticized Foster's classification because he expands Hale's phrase "to rob or murder" to cover "any" felony. It is submitted, with a need for pardon having disappeared or, at least, diminishing in importance, the criticism is difficult to maintain because the felonies which could be prevented under the old laws so as to be justifiable homicide were not limited to such felonies as Hale had described.[14]

The original justifiable homicide rule was established for the execution of the law and the maintenance of public safety against felons. Hale had said "a man is bound to use all possible lawful means to prevent a felony".[15] Before the Statute of Henry 8 took effect, in theory the rule provided for no fully justifiable private defence.

The full use of the extension to "any felony" as expounded by Foster would seem at first sight to be a reasonable one, and was certainly so for any felony which was committed against one's person or habitation. It seems however to have proved too wide for modern purposes when the apprehension of criminals is more certain and the punishments which may be inflicted are less stringent; some of these factors may explain the rise in recent years of a compromise verdict of manslaughter.

At common law one is still faced with the anachronistic division of crime into felony and misdemeanour; this creates some absurdities if a man is acquitted of murder where there was only a minor felonious

12 *Ibid.* As to retreat see *infra.*

13 *Id.* at 274. (Italics supplied)

14 When Hale spoke of the statute of Henry 8, he stated that it was enacted to remove a doubt as to whether a person who killed a robber in or near the highway, or one who intended to rob or murder in a dwelling house should be exempted from forfeiture. 1 *Hale* P.C. 487. Hale also pointed out, when illustrating the applications of this provision, that it did not apply to a "bare trespassing entry" into a house, but "only to such an entry or attempt as is intended to be murder or robbery, or some such felony". *Ibid.* He also pointed out that it did not include a felony which was not accompanied by force.

15 1 *Hale P.C.* 484. *Cf.* previous footnote.

attack. It must be remembered that Foster's rule did limit justifiable homicide to a person who had been subjected to a violent felony. The requirement of inevitable necessity was also maintained being specifically reserved by the words "repel force by force". If a private person killed another who had committed a felony or had attempted to do so, the innocent party could only be justified if he had been resisted with murderous intent or at least with such force that he apprehended, on reasonable grounds, that his life was in danger.

Blackstone considered that the justification allowed by Foster's rule was only applicable where the crime which was prevented was capital (which, at that time, gave ample scope). The law of England would not allow killing in other circumstances to be committed with impunity where the felon would not himself have been subject to capital punishment. If this is so, it would make much of the present common law, particularly in relation to the prevention of felonies against property, meaningless. This too may mean that the defence of excessive self-defence will recommend itself to modern judges.

It should be noted that in *R.* v. *Jackson,* although the deceased was at first simply a trespasser he was declared by the penal law of Nyasaland to be a felon because of his attack upon Jackson. Despite the felonious attack which was also violent, one could hardly say that Jackson had reasonable grounds, viewed subjectively or objectively, for thinking that his life was in immediate danger.

Retreat

The editor of Kenny[16] is of the opinion that the distinction between excusable and justifiable homicide is still of importance because in the former, retreat is still needed. It is submitted that the distinction is not as clear as this classification would lead one to believe.

In relation to the breaking down of forfeiture, it should be remembered that Hale had stated that homicides were justifiable if the person killing was attacked in a manner which was imminently dangerous to life, or as a result of a violent felonious attack. This, as has been shown, does not limit these to the homicides originally under the old justifiable connotation.

Hale recognized this and the unreal historical distinctions were thrust aside in a situation where A "assaults B so furiously, that B cannot save his life if he gives back".[17] This does not differ from Foster except in the one aspect that the latter's writings might give a wider interpretation to the felony which may be resisted with fatal results.

Professor Beale was critical of Foster because of the latter's assertion that there was no need to retreat in circumstances of a violent felonious attack. Beale agreed that under the old rules (that killing is in self-defence in the apprehension of an escaping felon or to prevent a robbery), the person seeking justification need not and in fact, should not retreat because it would allow the felon to carry out his purpose. In the case of one who is a victim of a murderous attack, Beale argues, it is necessary for him to retreat because this would thwart a felon's

[16] 17th Edition, 1958, p. 130.
[17] 1 *Hale P.C.* 482.

purpose.[18] It has been suggested by one writer that this is a logical distinction because a person who retreated would also frustrate the would-be robber who sought to deprive the potential victim of his valuables.[19]

In support of his restricted rule, Beale suggests that it is obligatory for a man to escape if he is able to do so because the law "owns not any such point of honor"[20] and therefore would not consider it cowardice to flee.

It is submitted that this loses sight of the very basis of the plea of justifiable self-defence, that the party kills on an absolute necessity. No question of retreat arises if the attack on the party killing is so fierce that he can do nothing but kill his attacker.[21] If the attack does not amount to a violent felonious one and the accused kills without retreat it would appear to be manslaughter at least.

In Foster's second category, it is submitted that the cases there set out should be interpreted as covering the situation, if at all, where retreat is necessary. If the offence committed by the deceased was a non-violent felony or a misdemeanour, then there is no defence at all.

If the party killing was the aggressor and never ceased being the aggressor he is "in no sense blameless" and cannot rely upon the defence in any event. This position may be varied if the other party introduces a new element, *e.g.* a deadly weapon, into the affray which was not previously present. In such an event, he should retreat if he can avail himself of the opportunity.

If the original aggression by the party claiming an excuse was with malice aforethought, his plea will fall on deaf ears. The only way he could re-acquire a right to self-defence, even on retreat, would be if the transaction is terminated,[22] and, on an entirely fresh skirmish (and retreat) he may be able to make a successful plea.

It is submitted that Beale does Foster an injustice in stating that Foster has not distinguished between "the retreat to avoid the necessity to kill and the retreat to avoid responsibility for the combat".[23] In any sudden affray a party must protect himself from liability, if he so wishes, by retreating for that very purpose. Foster had explained in the very terms of his rule that there must be a retreat by a party in a sudden affray (where there was, by definition, blame on both sides). This may have been initially to protect himself from responsibility; however, as a consequence of this, it puts such party in a position where, if it is necessary, he may kill on an absolute necessity. This is clearly expressed by Foster who stated that the final killing was "urged by mere necessity".

Perkins points out that the law does not take too strict a view of the party killing where a sudden affray has developed. He would tend, however, to retrict Foster's "in some measure blameable" to a minor infraction of the peace which was disturbed by the quarrel. He suggests

18 *Op. cit.* at 574.
19 Perkins, *Criminal Law*, 890-893 (1957 ed.).
20 In support see 1 *Hale P.C.* 481 and modern case of *R. v. McCluskey* [1959] S.L.T. (Notes) 26.
21 See Hale, n. 17.
22 1 *Hale P.C.* 479.
23 *Op. cit.*, 575.

that "one may be recognized as 'without fault' for the purpose of this rule if he is not the legally recognized cause of the encounter, did not culpably participate therein, and was at the time where he had a lawful right to be".[24]

The position of retreat in the rules of self-defence has been examined in terms of strict law. Changed social conditions tend to change the emphasis; for instance, in most cases it would be useless to retreat from an assailant who is armed with a gun rather than a dagger or a sword. No man is expected, in reality, to retreat if he is in such an imminently dangerous position[25] that it would be foolish for him to do so if a retreat would not diminish the danger.[26]

On the other hand, in the words of Beale "no killing can be justified, upon any grounds, which was not necessary to secure the desired and permitted results; it is not necessary to kill in self-defence when the assailed can defend himself by the peaceful though often distasteful method of withdrawing to a place of safety".[27]

There must be a balancing of interests; the person attacked who did not retreat and killed in what he claimed to be justifiable self-defence will assert that he considered he need not relinquish his position, as one who had a right to be were he was, to a clear wrongdoer. On the other hand, in these days of strong regulatory agencies in the community along with the opportunity for easier recourse to civil remedies in the courts of law, the sanctity of human life should be maintained at all costs.

In the United States case of *Brown* v. *U.S.*[28] Mr. Justice Holmes gave expression to the attitude which should be taken in the circumstances where an unreal rule, such as the retreat one, is no longer useful:

> concrete cases or illustrations stated in early law in conditions very different from the present . . . have had a tendency to ossify into specific rules without much regard for reason.[29]

It is submitted that the modern attitude to the retreat rule is admirably stated in *R.* v. *Howe*[30] where it was held that:

> . . . a man who is subjected to a violent atrocious attack upon his body is not bound, at all costs, to retreat at the risk of being found guilty of murder if he does not do so, but that he should retreat rather than kill (or inflict grievious harm on) his assailant, if, as the circumstances appear to him (exercising a reasonable judgment) at the time, he could do so without endangering his own safety or jeopardizing his chances of successfully avoiding the consummation of a violent and felonious attack.[31]

In general terms the rule is laid down that:

> . . . retreat is an important element—though only one of several elements—which a jury are entitled to take into account in deciding whether the suggested self-defence disclosed was reasonably necessary in the circumstances.[32]

A final word from Perkins is appropriate in this context:

> While it seems impossible to support Beale's position as a statement of the common law of England, it is very difficult to give a successful answer to his argument that the "no retreat" rule tends to perpetuate a rough frontier

24 *Op. cit.*, 899.
25 Including the case where the man attacked reasonably believes himself to be so placed.
26 1 *Hale P.C.* 482.
27 *Op. cit.* at 580.
28 (1920) 256 U.S. 335.
29 *Id.* at 343.
30 [1958] S.A.S.R. 95; 32 A.L.J.R. 213.
31 *Id.* at 100.
32 *Ibid.*

philosophy which places a false notion of "honour" above life itself. The claim that the "retreat rule" tends to breed a race of cowards is quite spurious. There is seldom an obviously safe retreat where both parties have firearms. The usual situation is where the defender is so armed while the assailant is approaching with some other weapon which is deadly but does not have so long a reach. Under such circumstances it does not require much bravery to shoot the other while he is still beyond the effective range of his weapon.[33]

It was decided in *Jackson* that the accused was not able to retreat. This is not explained, but the court considered it was not material for the purposes of Jackson raising the defence of self-defence. In any event, it is submitted that Jackson was not in a position where he had to retreat because of the anomalous "castle" doctrine which was not mentioned by The Federal Supreme Court in this context.

Retreat and The 'Castle' Doctrine

If degree could be introduced into the question of lawful homicides the most obviously "justifiable" homicide is that which arises out of the action of a man who kills "in repelling force by force in defence of his habitation, person, or property against one who intends or endeavors by violence or surprise to commit a known felony such as rape, murder, robbery, arson, and the like upon either".[34] The historical reason for this is that very man is bound to use all possible lawful means to prevent a felony as well as to take a felon.[35]

The defender may pursue the felon or intended felon until his personal property is out of danger and if necessary he may kill him while so doing without the need to retreat.[36]

In *R.* v. *Kwaku Mensah*[37] the appellant had suffered severe stab wounds while engaged in a fracas involving the deceased who was one of a band of suspected thieves. In addition, the deceased, when being pursued, had emerged from the appellant's house and, while escaping, was shot and killed by the appellant. Self-defence was not the primary consideration of either the appellant or the Judicial Committee of the Privy Council. Lord Goddard was of the opinion that a verdict of lawful homicide in defence of property or person was not open to the appellant as the deceased was running away; he decided that the appellant could have been provoked by the stabbing which was inflicted upon him while the appellant was defending himself or his property.[38]

In most of the cases in which an accused is claiming the defence of his habitation he has been mistaken as to the motives of the person killed, but nevertheless the accused has been afforded a justification where the accused has an honest belief in a state of facts which, if true,

33 *Op. cit.* 908-909 and *R.* v. *McCluskey*, *supra*.

34 1 *Hawkins P.C.* 82, Foster, 271, 274; 1 East P.C. c. 5, s. 44.

35 See *Handcock* v. *Baker* (1800) 2 B. & P. 260; 126 E.R. 1270.

36 *Per* 1 *Hale P.C.* 486:
"He need not fly as far as he can as in other cases of *se defendendo* for he hath the protection of his house to excuse him from flying for that would be to give up the possession of his house to his adversary by his flight".
Of course the lack of any need for retreat is all the stronger, if not an obligation, in the case of an officer. *Case No. 30* (1771) Jenk. 291; 145 E.R. 211.

37 [1946] A.C. 85.

38 This has the potentiality of making the fields of self-defence and provocation very interwoven and therefore adds to the confusion. There are three cases, however, in which Lord Goddard could have found support. In each the court had negated any suggestion of a successful plea of lawful homicide *per* self-defence. In *R.* v. *Keith* [1934] S.R. Qd. 155, the accused was himself a trespasser in attempting to retrieve his property. In *R.* v. *Manchuk* [1937] 3 D.L.R. 343, and to a lesser extent, *R.* v. *Perera* [1953] A.C. 200, the accused had used excessive violence in defence against a minor infraction of property rights. *cf.* 1 *East* P.C. 288.

would exonerate him if the accused had reasonable grounds for such beliefs.[39] It has also been held that the killing of a house-breaker is not justifiable when the felon has made his escape from the premises empty-handed and is some distance from the house. In these circumstances no more should be done than is necessary to capture him.[40]

The law has shown a peculiar predilection for a man who uses force in defence of his castle.[41] A broad expression of the rule was given in *Semayne's case*[42] which is the *locus classicus* of the 'castle' doctrine. In that case, the court said:

> The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose, and although the life of a man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortunium*, without any intent, yet it is felony and in such case, he shall forfeit his goods for the great regard which the law has to a man's life . . . but if thieves come to a man's house to rob him or murder, and the owner . . . kill any of the thieves in defence of himself and his house it is not felony and he shall lose nothing.[43]

A modern decision of a Canadian court strikes a more cautious note in stating that it should be shown that the force used by the accused was not greater than was reasonably necessary to prevent the prosecutor from dispossessing him of his lands or goods and a conviction is proper if the blow was unnecessarily severe and was vindictive rather than preventative. In *R. v. Kinman*,[44] the accused was only charged with assault, but, it is submitted, the principle has the effect of amending the old common law and is to be commended. The overall sanctity of the 'castle' doctrine is diminishing in its force. As the range of police protection and the availability of legal remedies, civil and criminal, widen, the law expects less self-help and more resort to official and more peaceful means of settling differences and redressing grievances.[45]

It is unfortunate that in 1924 Lord Hewart C.J. assumed, in *R. v. Hussey*,[46] what is considered the false role of guardian of the bastion of the common law. The case reveals a very jealous and exaggerated protection of fundamental rights. The Lord Chief Justice quashed a conviction for wounding with intent when Hussey had fired rifle shots

---

39 *E.g. R. v. Dennis* (1905) 69 J.P. 256. Note, however, that in this case the judge observed that the accused may not have been acquitted if he had fired the shot with the intention to kill or to do grevious bodily harm. As to reasonable belief; see *Leete v. Hart* (1863) L.R. 3 C.P. 322.

40 *R. v. Bolaki Jolahad* (1868) 1 Bengal L.R. 8 and *dicta* in *R. v. Davis* (1837) 7 C. & P. 786; 173 E.R. 343. There is a stronger view of the law in *R. v. Hinchcliffe* (1823) 1 Lew. 161; 168 E.R. 998. Cf. *R. v. Langstaffe* (1827) 1 Lew. 162; 168 E.R. 998. A strong case in favour of the householder is *R. v. Levett* reported in *R. v. Cook* (1639) Cro. Car. 538; 79 E.R. 1064. All the commentators but Foster agree with this decision. Foster, *op. cit. supra* 299, thinks it should be manslaughter as "due circumspection" was not used. On the other hand, Hale goes so far as to include it under a discussion of homicide *per infortunium*, 1 *Hale P.C.* 474.

41 ". . .the making of an attack upon a dwelling house . . ., the law regards as equivalent to an assault", per Holroyd J. in *R. v. Mead & Belt* (1823) 1 Lew 184, 185; 168 E.R. 1006.

42 (1605) 5 Co. 91a; 77 E.R. 194.

43 *Id.* at 91b; 194. It was also said that if a housekeeper killed anyone who tries to break and enter his close, he may resist and oppose such entry and any damage happening to the person entering is justifiable in defence of property. This is unnecessarily broad and many of the declarations of this principle were made in other than criminal cases or at least, in cases other than homicide *e.g. R. v. Semayne* itself was an action on the case; *Weaver v. Bush* (1798) 8 T.R. 78; 101 E.R. 1276, an action in trespass for an assault and battery; *Handcock v. Baker, supra*, an action for breaking of the plaintiff's dwelling house and assault.

44 (1911) 19 C.C.C. 139.

45 Two Indian cases contain an implied agreement with this assertion. In *R. v. Guru Charan Chang* (1870) 6 Bengal L.R.A.C. 9 and *R. v. Narsang Pathabhai* (1890) I.L.R. 14 Bom. 441, self-help was allowed where there was no opportunity to seek outside help due to lack of time or general expediency.

46 (1924) 18 Cr. Appr. 160.

through a door which was being attacked by his landlady and two others armed with a hammer, spanner, a poker and a chisel. The court found that Hussey had not been given sufficient legal notice to vacate the room which he was so zealously defending. The court treated Hussey as if he was defending his house or 'castle'.

It is interesting to note that no cases are reported as having been cited in support of the argument or in the judgment. The only authority quoted was Archbold[47] which provided that:

> . . . in defence of a man's house, the owner, or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner, as he might, by law, kill in self-defence a man who attacks him personally.[48]

It is submitted that the phrasing is unfortunate and that a person who intends to "forcibly dispossess" is more than a trespasser. It is a clear rule of law that the householder is not entitled to do more than peaceably eject a trespasser.

On the other hand, even if it is presumed that the landlady and her party were more than mere trespassers, authority does not support the decision in *R.* v. *Hussey*. There is a passage in the current edition of Archbold,[49] identical wtih that cited in *R.* v. *Hussey*, which relies on Hale for its authority; Hale's statement does not support the proposition that a killing in a case such as *R.* v. *Hussey* would be justified.

While the 'castle' rule will certainly apply to felonious attack, it does not apply to trespass or even to misdemeanours.[50]

It must be admitted that in *R.* v. *Mead and Belt*[51] Holroyd J. said in his direction to the jury that the forcible taking of possession of another man's close is more than trespass. He added, however, that a man is not authorized to fire a pistol on every intrusion or invasion of his house; such an intruder should be removed by any other possible means before "recourse is had to the last extremity". In the light of the recent cases of excessive self-defence it is worth recording that the accused was convicted of manslaughter although there were strong reasons for his apprehending grave danger to his person and to the safety of his family.

It is submitted that the sanctity in which a man's dwelling house or 'castle' is held is disproportionate to the importance of the concept in a modern society where its members no longer live in moated keeps.

---

47 26th edition (1922).
48 *Op. cit.* at 887.
49 P. 958 No. 2513, (34th ed. 1959).
50 The passage in Archbold, *supra*, refers to the "restricted rights to kill in justifiable homicide against a misdemeanour, such as a trespasser in taking goods"; the owner may justify a beating but not a killing. The defence of a house is treated as an exception to this, without, it is submitted, the support of the authority of Hale which is claimed for it. The passage from Hale is worth quoting at length—after stating that these are diversities on the question of defence of property between first, a trespassing act and a felonious act and secondly between types of felonious acts themselves. Hale stated:
"If A, pretending a title to the goods of B, takes them away from B as a trespasser, B may justify the beating of A but if he beat him so that he dies, it is neither justifiable, nor within the privilege of *se defendendo*, but it is manslaughter.
"A is in possession of the house of B. B endeavors to enter upon him, A can neither justify the assault nor beating of B for B had the right of entry into the house, but if A be in possession of a house, and B as a trespasser enters without title upon him, A may not beat him but may gently lay his hands upon him to put him out, and if B resists and assaults B then A may justify the beating of him, as of his assault. But if A kills him in defense [sic] of his house it is neither justifiable, nor within the privilege of *se defendendo* for he entered only as a trespasser and therefore it is at least common manslaughter: this was *Harcourt's case* . . . who being in possession of a house by title, as it seems, A endeavored to enter and shot an arrow at them within the house, and Harcourt from within shot an arrow at those that would have entered, and killed one of the company, this was ruled manslaughter . . . and it was not *se defendendo* because there was no danger of his life from them without."
51 *Supra.*

It is further submitted that it is absurd that Hussey, a mere tenant, should be able to claim the protection of this fundamental liberty and cause serious yet "justifiable" injury as the result of a technicality of tenure. The decision is also deplored because he used force that was excessive in the circumstances; the defendant knew that force was being used to enable the landlady to obtain entry to the room and not to injure him.[52]

In an Australian case[53] which is similar to *R.* v. *Jackson,* the accused (G) and the deceased (D) were neighbours and had been quarrelling over real or alleged trespasses. A few days before the killing D shot one of G's pigs. G retaliated by killing one of D's pigs. On hearing of this D, a powerful violent man of strong temper, ran unarmed to G's house to find G standing in his door-way armed with a shotgun. G told D to stop, which he did. Without further incident, G shot him dead. There was evidence of former threats of violence which inferred that G had good reason to fear the deceased. He was convicted of murder, but on appeal the conviction was quashed on the ground that the defence of justifiable homicide was not put to the jury. The Court of Appeal *per* Stephen C.J. took the view that the accused had no actual grounds for apprehension of personal danger but nevertheless had reasonable although mistaken grounds for such belief. The Chief Justice said:

> It was contended . . . that under the circumstances the prisoner reasonably believed, and at all events really did believe, that the deceased was about to inflict serious bodily injury on him, and that he could not otherwise protect himself from the meditated violence . . . now, if there was in fact such a design manifested on the part of the deceased . . . or reasonable ground for believing that such a design existed—the prisoner was entitled immediately to take effectual measures for his protection . . . The person so believing could not indeed justify the taking of a life, or using a deadly weapon in a manner likely to take life, unless he could not otherwise prevent the apprehended injury—or at least, unless there was reasonable ground for believing that there was no other means, and he did in truth act on that belief.[54]

The main rule which is exceptional to general self-defence is the rule that a person attacked feloniously and violently or a person whose 'castle' is broken into or attacked with felonious intent is not obliged to retreat. It would appear from *dicta* in *R.* v. *Hussey* as well as principles enunciated in the American cases of *Beard* and *Alberty* that the protection of the accused when in his 'castle' extends to felonious attacks committed upon his own person.

Trespassers

It is probably true that if a felon is resisted in the 'castle' of the intended victim, the killing is justifiable. What is the position if the supposed felon simply came to chastise or beat a man or to take his goods as a trespasser? What is the position if one who claims title to a man's house without legal foundation seeks to dispossess him? The cases

---

[52] *Cf. R.* v. *Dakin* (1828) 1 Lew. 66; 168 E.R. 999 in which the accused who was a lodger in a house (which was therefore his castle) was charged with manslaughter. The jury acquitted him but the judge observed that he might have been convicted if he had known of the existence of a back exit as he should avoid a conflict. This seems contrary to authority (*e.g.* Foster, 273) but may be explainable on the basis that the affray was a mutual one. See also *R.* v. *Cooper* (1640) Cro.Car. 544; 79 E.R. 1069.

[53] *R.* v. *Griffin,* (1871) 10 S.C.R. (N.S.W.) 91.

[54] *Id.* at 99-100. See also the American cases of *Beard* v. *U.S.* (1894) 158 U.S. 550 and and *Alberty* v. *U.S.* (1895) 162 U.S. 499. The latter was very similar to *R.* v. *Griffin, supra.*

and the old authorities[55] appear to make it permissible in law to lay hands on him to eject him if he forcibly resists and to beat the trespasser to make him desist; to use stronger action against him so as to kill him would be manslaughter at least. Hale[56] states that it would not be manslaughter if the trespasser started to assault the householder. This is an important point in the *Jackson* context. It is not an excuse for a man to use a dangerous or deadly weapon against a trespasser on his property.[57] The rule on this would appear to be clear and if the accused has no reason to think his own life is in danger and that the deceased offered no resistance, then a mere trespass will not always justify an assault[58] let alone a homicide.

THE CONCEPTION AND MISCONCEPTION OF CHANCE MEDLEY

Foster classified a second and more "heinous" form of self-defence which he termed culpable self-defence and which was described as "in some degree blameable and barely excusable". It applied in the case where a person, engaged in a sudden affray, quit the combat before a mortal wound was given and who, having retreated as far as he could with safety, and urged by mere necessity, killed his adversary for the preservation of his own life.[59]

Both East and Foster describe this as "*se defendendo* upon chance medley". In modern legal terms it would appear that the learned writers used their terms loosely. It did not reflect the later and, it is submitted, legitimate meaning of chance medley. The facts describe a chance medley situation there being a sudden affray but the end result was not manslaughter but a "pardonable" self-defence.

In the stringency of the law of the period the underlying idea behind the classification of homicide was the law's wariness for any escape for a person who killed with any taint of blame upon him.[60] Therefore, unless a man was free from blame due to the killing being a pure accident or whilst pursuing a public duty in the execution or advancement of justice, such as the apprehension of a felon or the prevention of a dangerous or violent felony, the law implied some degree of fault.[61]

In Foster's classification of excusable homicide it did not matter who

---

55 1 *Hale P.C.* 473-474, 481, 485-486; 1*Hawk. P.C.* 98, c. XIII, ss. 33, 36 and 38; 1 *East P.C.* 237, 272, 287, c.v. s: 44.

56 1 *Hale P.C.* 486.

57 1 East, *Pleas of the Crown* 288 (1803 ed.), cited hereafter as *East P.C.* See provisions of 24 Henry 8 c. 5. Hale pointed out (1 *P.C.* 488) that this statute did not extend to trespassing entries on property.

58 *E.g. State* v. *Morgan* (1842) 38 Am.Dec. 714.
As to lawful way to expel trespassers, see *Moriarty* v. *Brooks* (1834) 6 C. & P. 684; 172 E.R. 1419; *Howell* v. *Jackson* (1834) 6 *C&P* 723; 172 E.R. 1435. See also *Weaver* v. *Bush* (1798) B T.R. 79; 101 E.R. 1277; *Holman* v. *Bagge* (1853) 1 El. & Bl. 782; 118 E.R. 629.

59 Foster, 276; 1 *East P.C.* 221.

60 This explains the need felt for forfeiture and pardon. I *Hawk. P.C.* 83, s. 24; 4 *Bl. Comm.* 188. Russell (vol. II, 491-492) says this was simply an attempt to rationalize; but see the explanations given by Loughlin in *Select Essays in Anglo-American Legal History*, 277 (1908).

61 Blackstone (4 *Bl. Comm.* 188) said:
". . . the law sets so high a value upon the life of a man that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was no unfortunate as to commit it; who therefore is not altogether faultless. And as to the necessity which excuses a man who kills another *se defendendo* . . . the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed . . ."

gave the first blow; it was a sudden and casual affray with violence on both sides. Foster described it as bordering "very nearly on manslaughter".[62]

Both East and Foster[63] went to great pains to place importance on the question of malice in excusable self-defence upon chance medley in a sudden combat. They pointed out the difference between that kind of killing and manslaughter. Two factors had to be proved; first, that before the mortal stroke was given the slayer declined and retreated and, secondly, that his adversary was killed through the mere necessity of avoiding immediate death.

East said:

> Where two parties meet on equal terms, all malice apart; it matters not who gave the first blow, so in this cast of excusable self-defence, the first assault in a sudden affray, all malice apart, will make no difference, if either party quit the combat and retreat before a mortal wound be given.[64]

Hawkins[65] thought this was too favourable to the person killing because if the slayer had given the first blow the primary fault was in him. It is submitted that this reasoning is too hair-splitting as the incident was one of sudden quarrel where the striking of the first blow was not of great consequence in the general scene of an interchange of blows, apart from the fact that it would have been difficult, if not impossible, to discover who gave the first blow.[66]

Hale's distinction as to presence or absence of retreat was, it is submitted, much more realistic. Even in this situation, however, an exception had been made. If A assaulted B so fiercely that giving back would endanger his life then no retreat was necessary to bring his case within the rule of necessity and self-defence; or if in the assault B fell to the ground so that he could not fly, in such case if was only self-defence of the more culpable type.[67] Hale extended his rule beyond that of East. The latter said that:

> . . . if B had returned A's assault so fiercely that he could not reteat without danger, or if A had fallen to the ground and then killed B, . . . still this should not be interpreted to be done in self-defence upon chance medley, because as it has been said, a fall not being voluntary as a fight is, it does not thereby appear that A declined fighting, and therefore B cannot safely quit the advantage he has gotten.[68]

East, therefore, laid down that an assailant such as A must have made an actual unequivocal retreat by quitting the combat as far as he could so as to reduce the killing to self-defence on chance medley and that his intention must not be shown by any ambiguous or casual act such as his falling.

Hale was undecided as to the liability of A in a case where A made

---

62 The learned editor of Russell (vol. I, 516) goes as far as saying it is manslaughter.

63 Foster, 276; 1 *East P.C.* 280. See 4 Bl. *Comm.* 184 for a statement in similar terms.

64 1 *East P.C.* 280.

65 1 *Hawk. P.C.* 87, s. 18.

66 East said:
"Nothing can be more dangerous or unjust in matters of this nature, than to establish material distinctions upon points which do not enter into the intrinsic merits of the case . . . where parties upon a sudden quarrel agree to fight, how little does it matter, as the point of the offence which makes the first blow." (1 *East P.C.* 242).
It must be remembered, of course, that if the two met by prior arrangement and with malice, the killing of either by the other would be murder. 1 *Hale P.C.* 452. See *R.* v. *Thomas* (1614) 2 Bulst. 148; 80 E.R. 1022.

67 1 *Hale P.C.* 482.

68 1 *East P.C.* 282.

a sudden assault with malice on B, who struck again at A and pursued hard against A and then A, before the mortal wound and truly declining any more part in the fight, retreated to the wall and in saving his own life, killed B. He suggested this to be self-defence. East[69] suggested that Hale could not possibly have meant "malice" meaning "pre-existing malice" because he used the words 'on sudden assault'. This, of course, was the same situation in essence as has been mentioned before. Hale meant malice, of course, in the strict legal sense that killing would be manslaughter at least because A could not take advantage of the necessity which he created by his own deliberate act. Foster (and Blackstone) put an authoritative seal on the argument by laying down:

> . . . that in order to excuse the person retreating upon the foot of self-defence the fighting must not have been upon malice; and that in all cases where the two ingredients of the retreat before a mortal stroke, and the inevitable necessity are wanting, the case would amount to manslaugher, which is clearly not applicable to deliberate duelling.[70]

"Self-defence upon chance medley" denoted in its nature combat upon a sudden occasion whether upon an old grudge or a new quarrel, but not upon malice in a strictly legal sense. In the case of a deliberate combat to fight and kill, both parties left themselves open to the implication that they deliberately foresaw any harm which would arise and this was very different from the case where parties fought on a sudden occasion without malice and deliberation under the impulse of a sudden affray. Therefore, it is difficult to see the first case as less than manslaughter.[71]

With the absolute abolition of forfeiture,[72] it would appear that the distinction between justifiable self-defence and so-called self-defence upon chance medley became meaningless, particularly in terms of punishment. As has been stated earlier, it is unfortunate that the types of self-defence were not properly differentiated so that degrees of justification would be available. Perhaps this could be said for the new qualified defences which have been described.

Lord Goddard C.J. in *R. v. Semini*[73] decided that the "old" defence of chance medley was no longer open to the accused in mitigation or excuse for killing which took place "on the sudden" in an affray or fight. It was decided in that case that in future the person who would have relied on chance medley must now seek an excuse or mitigation for the killing in self-defence or provocation.

In the seventeenth century chance medley was defined in these terms:

> Manslaughter, otherwise called chance medley, is when two do fight together upon the sudden without malice precedent and the one of them doth kill the other; in which case the offender shall have his clergy.[74]

---

69 *Id.* at 283.

70 Foster, 273 and 4 *Bl. Comm.* 184.

71 1 *Hawk.* P.C. 97, 98; c XII, ss. 28, 34.

72 By 9 Geo. 4 c. 31, s. 10.

73 [1949] 1 K.B. 405.

74 Pulton, *De Pace Regis et Regni*, 117, 121 (1610). The Statute of Stabbing had been reputedly passed to discourage juries from mitigating killings which had been adjudged as being on provocation where there was no foundation for such a verdict. This legislation provided that:
> ". . . if one person stabbed another who had not then a weapon drawn or had not then first struck a blow, this would be dealt with as a case of wilful murder though it could not be proved that the stabbing was done of malice aforethought.

Some commentators had misapplied the term 'chance medley' to 'death by misadventure'. Foster[75] pointed out this error. He decided that the term 'chance medley' did not envisage misadventure (which was a misconception which had arisen because of the misinterpretation of a statute[76]) and that it was meant to apply to a sudden casual affray commenced and carried on in the heat of blood. Therefore, Foster continued, 'self-defence upon chance medley' implied that the person engaged in a sudden affray quitted the combat before a mortal wound was given, and retreated and fled as far as he could with safety and then, urged by mere necessity, killed his adversary for the preservation of his own life.

It is submitted that this approach to self-defence does not abrogate the previous argument as to the necessity, or otherwise, of retreat. Instead, it was another special case relating to retreat. Foster described this type of self-defence as: ". . . culpable but through the benignity of the law, excusable."

He termed it, as has been noted, 'self-defence upon chance medley' which was barely excusable with a good deal of blame attached. The only way this blame could be negated was by absolute necessity after a retreat in reasonable circumstances.

Although it has been seen that Foster and East[77] were describing legitimate chance medley situations, it must not be thought that the 'barely excusable' homicide described by Foster was a definition of chance medley.

It is submitted that chance medley is a term which must be separated from the concept of ordinary self-defence and that in the pronouncements of Foster it is simply a descriptive term pointing to the killing having been committed in self-defence after a sudden quarrel, but also after a retreat. The term 'chance medley' is merely one incident in the excuse allowed in circumstances of 'excusable' self-defence.

It will be seen from an examination of the early authorities that the confusion as to the meaning of chance medley has grown out of the chronic misuse of terms in the law as laid down two or three hundred years ago. This misuse was accentuated in the case of chance medley because it was closely connected with "manslaughter" which was subject to many incorrect interpretations.

Hale, for instance, was justly criticized by Foster for equating chance medley and killing *per infortunium*.[78] In his treatise Hale also continued throughout to describe cases of sudden provocation which would, a century before, have been described as manslaughter upon chance medley.[79]

Hale[80] describes one case of a sudden quarrel arising out of an old enmity; he described a killing in such circumstances as without malice prepense if it happened upon sudden provocation. Some of the at-

75 *Op. cit.* at 275.

76 24 Henry 8 c. 5.

77 East said:
". . . the very name 'self-defence upon chance medley' denotes in its nature a combat upon a sudden occasion . . ." (1 *East P.C.* 284)

78 1 *Hale P.C.* 472.

79 This can be explained in part on the basis that provocation was unknown as a separate category in the time of Coke.

80 1 *Hale P.C.* 451-452.

tributes of this example are applicable to the modern law of provocation, but others are alien to it and also to the criteria set down by Hale himself.[81] In a case which would now be described, at least outside England, as one of excessive self-defence, Hale describes it as "bare homicide". This term would appear to denote manslaughter as the same verdict is considered applicable by Hale in the following example:

> If A and B fall suddenly out, and they presently agree to fight in the field and run and fetch their weapons, and go into the field and fight, and A kills B this is not murder but homicide, for it is but a continuance of a sudden falling out and the blood was never cooled;[82]

It would appear, with the advent of provocation as a separate "defence", that one facet of manslaughter upon chance medley was eroded or perhaps one should say, separated.[83]

It would appear that many of the cases of manslaughter which Hale envisaged[84] were cases where excessive use of otherwise lawful force had been used, forming a separate category.

Hawkins also appeared to be confused in his classification of manslaughter, chance medley and justifiable self-defense. He describes a homicide which was without malice as manslaughter or sometimes chance medley and as "such killing as happens either on a sudden quarrel or in the commission of an unlawful act, without any deliberate intention of doing any killing at all".[85]

Hawkins describes the case of a man killing a bare trespasser or one who claimed a title to his house and adjudged it to be a case of manslaughter.[86] It should also be noted, however, that Hawkins was of the opinion that if a man in his own defence killed another who "assaults him in his house in the daytime" and who "plainly appears to intend to beat him only" he was guilty of homicide *se defendendo* for which he suffered forfeiture of goods and had the need of a pardon.[87]

Perhaps the true basis for chance medley is set out by Hawkins in the following quotation:

> And though it may be said that there is none (that is, no fault) in chance medley, and yet the party's goods are also forfeited by that, I answer that chance medley may be intended to proceed from some negligence or at least want of sufficient caution in the party who is so unfortunate as to commit it so that he doth not seem to be altogether faultless.[88]

Despite the fact that at times Foster appears to confuse provocation and chance medley because he refers to provocation as a sudden casual affray commenced and carried on in the heat of blood, the passages in his treatise would lead one to believe that, in certain circumstances he would class 'excessive self-defence' as manslaughter. For instance, the following quotation:

> . . . consequently self-defence upon chance medley must, as I apprehend, imply that the person when engaged in a sudden affray, quitted the combat

81 *E.g.* 1 *Hale P.C.* c. XXXVII.
82 1 *Hale P.C.* 453. He also describes (at 455, 478-479, 483) 'jostling' under the head of provocation and therefore manslaughter.
83 See the rewarding discussion of Snelling, *Manslaughter upon Chance Medley.* (1957) 31 A.L.J. 102.
84 1 *Hale P.C.* 481-483. More specifically, for present purposes, in cases where there was a simple transaction such as a straightforward felonious attack upon the accused, if the accused retaliated in an excessive manner, it was manslaughter (whatever was meant by that term). As to defence of others, 1 *Hale P.C.* 485; as to defence of property, *id.* at 485-486; as to pursuit of malefactors, *id.* at 489-490.
85 1 *Hawk P.C.* 89.
86 *Id.* at 83.
87 *Ibid.*
88 *Ibid.*

> before a mortal wound was given and retreated or fled as far as he could with safety and then, urged on by mere necessity, killed his adversary for the preservation of his own life.[89]

Foster describes the above as bordering "very nearly on manslaughter". It is interesting to note that he describes a case of manslaughter as one where it is presumed that the combat on both sides continued to the time the mortal stroke was given or that the party giving such stroke was not at that time in imminent danger of death.

The above extracts from Foster show the falling-out situation signified self-defence if there was a retreat and manslaughter (that is, provocation) if there was no giving back, where the quarrel in heat of blood continued until the death of one party.

At a later stage Foster described two types of homicide "upon a sudden affray and in heat of blood upon some provocation given or conceived". Included in this classification is provocation pure and simple[90] and homicide in fighting upon sudden quarrel.[91] It is mystifying that Foster did not describe the latter classification as chance medley. It is submitted however, that the second category was meant to have that interpretation.

Blackstone followed a similar classification to that of Foster and refers to chance medley in relation to "self-defence upon a sudden re-encounter".

This treatment of chance medley adopted by Foster and Blackstone continued to be used as describing excusable self-defence on a sudden quarrel and not as a separate type of homicide.[92] In the nineteenth century the term came to include the extended doctrine that if two fought on equal terms and during the course of the fight one snatched up a deadly weapon and killed, this was manslaughter only so long as there was no evidence of having entered the contest with the intent to use a deadly weapon.[93]

In *R.* v. *Mawgridge*[94] sudden combat and provocation were treated as separate categories. This distinction has been drawn until recent times when text writers have treated chance medley and provocation as indistinguishable for purposes of legal analysis.[95]

It has been contended by some commentators[96] that *R.* v. *Mancini*[97] is no authority for regarding as overruled the deeply entrenched doctrine of manslaughter upon sudden quarrel. This may be so, but it is submitted that the House of Lords intended to do just this. On the other hand, it is submitted that the stringencies to which the learned law lords subjected the doctrine of provocation should give added support to a submission that chance medley should exist as a defence.

---

89 Foster, 276.
90 *Op. cit.* c. 5, ss. 1 and 2.
91 *Op. cit.* c. 5, s. 3.
92 *E.g. R.* v. *Ayes* (1810) R. & R. 166; 168 E.R. 741; *R.* v. *Kessell* (1824) 1 C. & P. 437; 171 E.R. 1263; *R.* v. *Whiteley* (1829) 1 Lewin 173; 168 E.R. 1002; *R.* v. *Smith* (1837) 8 C. & P. 160; 173 E.R. 441; *R.* v. *Caniff* (1840) 9 C. & P. 359; 173 E.R. 868; *R.* v. *Grant* (1844) 8 J.P. 139; *R.* v. *Knock*, (1877) 14 Cox 1; *R.* v. *Bond* (1877) 14 Cox 2.
93 *R.* v. *Snow* (1776) 1 Leach 151; 168 E.R. 178; *R.* v. *Lynch* (1832) 5 C. & P. 324; 172 E.R. 995.
94 (1707) Kel. 119; 84 E.R. 1107. See also 1 *East P.C.* 232, 241.
95 Stephen, *Digest*, 9th ed. (1950) art. 316; Roscoe, *Digest of the Law of Evidence and Practice in Criminal Cases*, (16th ed. 1952); *Kenny's Outlines of Criminal Law*, 134 15th Ed. See also *Report of Royal Commission on Capital Punishment* (U.K.) para 128.
96 Landon in comment in 58 L.Q.R. 36 and Snelling, *op. cit.* at 107.
97 [1942] A.C.1.

In *R.* v. *Semini*,[98] the trial judge directed the jury that before the defence of chance medley (upon which Semini relied) could be established it must be proved that the provocation was such that the act which caused the death was commensurate with the provocation received. This direction was attacked on appeal against conviction for murder, with the claim that the doctrine of provocation had no application to chance medley. This, it is submitted, is a valid contention as the learned law lords never adverted to the problem which is presently being discussed.[99] This interpretation has also been borne out by the remarks of the judge in *R.* v. *Jackson*:

> Provocation was an offshoot from self-defence which is now completely separated therefrom and chance medley is still to be taken into account in a case where there was mutuality of combat and excessive use of force.[100]

The writer agrees with Snelling's[101] comments upon chance medley as it was treated in *R.* v. *Semini*.[102] Snelling's contention that *R.* v. *Snow* and *R.* v. *Smith*[103] were wrongly treated as cases based on provocation would also appear to be correct. It is submitted that, although the differentiation between provocation and chance medley in terms of punishment is not existent in modern terms of criminal law, the differentiation is significant because of the stringent rules applied to provocation.

Although sudden quarrels are less frequent than they were in the time when men went about armed and when they were more prone to open lawlessness, it would appear that there is need for an intermediate stage in the law of homicide.[104]

In this branch of the law it is very difficult to maintain watertight compartments. Foster himself stated that "self-defence upon chance medley" bordered very closely on provocation. Too often, in comparing provocation and self-defence the fact is lost sight of that, although passion is existent in both cases, in the provocation situation it is presumed that the person killing was not in immediate danger of death. Furthermore, a fight, possibly interrupted by a retreat, must be distinguished from a combat which continued unabated up to the time when the mortal stroke was given.

---

98 *Supra.*

99 See Morris, *A New Qualified Defence to Murder.* (1960) 1 Adel. Law Rev. 23, 42.

100 [1962] R. & N. 157 at 162.

101 *Supra*, n. 83.

102 The following cases were cited in support of Semini's plea: *R.* v. *Taylor* (1771) 5 Burr. 2793; 98 E.R. 466; *R.* v. *Snow*, *supra*; *R.* v. *Smith*, *supra*; *R.* v. *Whiteley*, *supra*; *R.* v. *Lynch*, *supra*. Crown counsel maintained that Hawkins' reference to chance medley (*supra*) was a misstatement and further argued that the only possible defence was provocation. No reference was made by the Crown to the cases cited above.

103 *Supra.*

104 Stroud's comment in *Mens Rea or Imputibility under the Law of England*, 303 (1914) is worth noting:

> "Many difficulties are inherent to cases of mutual fighting and struggling, where in the course of a trial it is often necessary to consider such diverse matters as the degree of homicidal intention evinced on either side, ignorance of fact, drunkenness, the nature, degree and effect of mutual provocation, the measure of reprisals, premeditation or deliberation, the scope of acts done in self-defence, and the effect on the passions and fears of both parties of the giving of blow for blow. Such cases are often further complicated by the intervention of third parties, with the object of stopping, encouraging or aiding the combatants; and all of these matters are usually capable only of the most imperfect proof, by reason of the quick succession of events, and the excitement of the occasion. It is, therefore, not surprising to find that in cases of sudden and unpremeditated affrays even with deadly weapons, where the fighting is not only mutual, but also on fair and equal terms (or at least with no undue advantage taken on the prisoner's part) the law makes no attempt to apply the rigid rules governing all other cases of provocation, but on the contrary treats the commencement of the affray as *causa remota*, and confines its attention to *causa proxima*, viz., the fighting itself, which, though perhaps unjustifiable in its origin, may in its course afford sufficient provocation to reduce an act of homicide from murder to manslaughter.

EXCESSIVE SELF-DEFENCE

It is doubtful whether the abolition of forfeiture brought all situations which were excused under chance medley within the terms applicable for a killing to be rendered lawful by self-defence.[105] The cases on sudden quarrel would give support to the decision of the judge in *Jackson's* case. In *R.* v. *Dakin*[106] a lodger had been subjected to violence in a mutual quarrel. The accused retaliated by killing one of his attackers wih a pair of long tongs. No mention was made of the 'castle' doctrine although one of the accused's assailants had knocked down a door. Dakin was only charged with manslaughter and acquitted on that charge upon the direction of the judge that he had used no more violence than was necessary. *Taylor's* case[107] was in strict contrast. He was indicted for murder after a mutual quarrel in an alehouse when he had stabbed to death one of his assailants. He was found guilty of manslaughter. In *R.* v. *Taylor,* Lord Mansfield instructed the jury to reduce the crime from murder to manslaughter on the basis of the defence available to the accused in provocation. The learned judge does not further explain the defence of provocation but it would apear that this case was really decided on the question of chance medley. *Whiteley's case*[108] gives a clear exposition of the sudden quarrel situation when non-deadly weapons were used—it was simply a fist-fight. Mr. Justice Bayley stated:

> If persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues it is manslaughter; if persons meet originally on fair terms and after an interval, blows having been given, a party draws in the heat of blood a deadly weapon and inflicts a deadly injury, it is manslaughter only. If the party enters a contest dangerously armed and fights under an unfair advantage, although mutual blows pass it is not manslaughter but murder.[109]

The first instance put by the judge was a clear case of manslaughter there being no need to refer to chance medley and provocation. The second was a case of chance medley. The third is an example of a clearly malicious killing and therefore murder. It should be noted that the conception of chance medley has altered; in the second instance given in the judgment in the summing-up of Mr. Justice Bayley, the mutual struggle did not cease before the deadly blow was given and there had been no retreat.[110]

The differentiation between the use of deadly weapons by both parties or the introduction of a deadly weapon by one party at a later

---

105 *R.* v. *Jackson* [1962] R. & N. 157 at 166.

106 (1828) 1 Lew. 166; 168 E.R. 999.

107 (1771) 5 Burr. 2793; 98 E.R. 466.

108 (1829) 1 Lew. 173; 168 E.R. 1002.

109 At 175-6; 1003. For a good exposition of the first illustration, see *R.* v. *Grant* (1844) 8 J.P. 139. In *R.* v. *Edwards* (1844) 8 J.P. 138, Coleridge J. said in a case where there "The law, made for fallible and frail creatures, adapted itself to the infirmity of was a fatal fight on equal terms where the prisoner was convicted of manslaughter. human nature".

110 Compare *R.* v. *Kessall* (1824) 1 C. & P. 437; 171 E.R. 1263. There was a quarrel between the prosecutor, P. and K. who was charged with cutting with intent to murder or to do grievous bodily harm, P struck the first blow and they fought for a few minutes when K ran a short distance and P pursued and overtook him. On being overtaken, K took out a knife and wounded P. K was acquitted. Park J. directed the jury that if K had retreated with the malicious intention of getting out his knife to use in the fight and so gain an advantage, it would have been murder if P had died although P had given the first blow and they had previously fought on equal terms. The jury obviously did not take this attitude.

stage in the combat has a decisive effect upon the result. In *Morley's case*[111] it was said that:

> . . . upon ill words, both the parties suddenly fight and one kill the other, this is but manslaughter for it is a combat betwixt two upon a sudden heat which is the legal description of manslaughter.[112]

The full significance of deadly weapons is seen in the following:

> . . . though a quarrel was sudden and mutual fighting before the mortal wound given; it is by no means to be (taken) as a general rule, that the killing a man will be only manslaughter. It is true, if reproachful language passes between A and B and A bids B draw, and they both draw (it is *not* material which one draws first) and they both fight and mutual passes are made, death ensuing from thence will be only manslaughter because it was of a sudden and each ran the hazard of his life.
>
> But there is a wide difference between that case, and where upon words, A draws his sword and makes a pass at B or with some dangerous weapon attacks him and then B draws and they fight and A kills B there though there was a quarrel upon abusive language and there was afterwards a mutual fighting, yet since A attacked B with a weapon or instrument which might have taken away B's life, though they fought afterwards, that will be murder.[113]

Probably many of the cases which have been described above would not result in similar verdicts today. This is due to the fact that the stringency of the law promoted these decisions in cases where judges and juries thought that the accused did not deserve the macabre and incongruous punishments which the law prescribed at that time.

Furthermore, the test of what conduct will lower a killing by legally mitigatory provocation is more stringent today. This is rationalised on the legalistic and partially unrealistic basis that man has become a more sophisticated social animal who is more likely to settle his differences in court than with a sword. It is submitted that if this qualified defence of chance medley is treated as a crude version of provocation or as a separate defence still applicable today, the only basis for it is as a concession to human nature implemented by a compromise verdict. This verdict is not backed by any question of absence of malice or by the circumscriptions of the regular self-defence rule. If a sudden affray, even with deadly weapons is mutual and on fair and equal terms, the law makes no attempt to apply the rigid rules applying to other cases of "provocation". The law, it has been said, treats:

> . . . the commencement of the affray as a *causa remota* and confines its attention to *causa proxima*, viz., fighting itself which although perhaps unjustifiable in its origin, may in its source afford sufficient provocation to reduce an active homicide from murder to manslaughter.[114]

It does not seem to matter that an unfair advantage was taken on a sudden impulse in the course of the struggle so long as it has not been premeditated.[115] Similarly the law is, on some cases, indulgent as to the use of weapons in the affray.[116]

---

111 (1666) Kel. J. 55; 84 E.R. 1080. There was at this time no clear notion of categories. The term" provocation" is used only in a descriptive sense to explain that words will not mitigate a killing.

112 *Ibid.* But see 61; 1083: ". . . that if A assault B without provocation and draw his sword at him and ran at him and then B to defend himself draw his sword to defend himself shall not lessen the offence of A from being murder . . . it is unreasonable that (B's) endeavor to defend himself should lessen the offence of (A) who set upon him without provocation".

113 R. v. *Oneby* (1795) 2 Ld. Rayd. 1485 at 1493; 92 E.R. at 475. See R. v. *McDowell* (1865) 25 U.C.R. 108.

114 Strond, op. cit., 303.

115 *R. v. Ayes*, (1810) R. & R. 167; 168 E.R. 741.

116 R. v. *Taylor*, R. v. *Snow*, R. v. *Kessall* and R. v. *Whiteley*, *supra*.

It has already been described, in relation to chance medley, that culpable homicide is only excusable where the accused had retreated. It usually arose in the case where he had not been entirely free from blame.[117]

Hale described one case where "A assaults B and B presently thereupon strikes A without flight, whereof A dies, this is manslaughter in B and not *se defendendo*".[118]

This commentator gave a further example which is on the presumption that:

> . . . if B strikes A again, but not mortally, and blows pass between them and at length B retires to the wall and being pressed upon by A gives him a mortal wound, whereof A dies this is only homicide *se defendendo* although B had given divers other strokes that were not mortal before he retired to the wall or as far as he could.[119]

The intermediate case cited by Hale is one where "A by malice makes a sudden assault upon B and strikes again and pursuing hard upon A, A retreats to the wall and in saving his own life, kills B".[120] Hale considered this case to be *se defendendo* simply because there had been a retreat and there was a necessity to save the life of the actual killer. It would not apply if the retreat had been feigned.

Hale also referred to a class of case where the killing is partly voluntary and partly involuntary where:

> A comes into the wood of B and pulls his hedges and cuts his wood and B beats him whereupon he dies ,this is manslaughter because though it was not lawful for A to cut the wood, it was not lawful for B to beat him but either to bring him to the justice of the peace or to punish him otherwise according to the law.[121]

Although Hawkins says that no malice must be "covered under the pretense of necessity"[122] and in those circumstances a killing would be murder, he does add the following description of a case which he describes as attracting the liability of manslaughter. He stated:

> Neither shall a man in any case justify the killing of another by pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself, for if a man in defence of an injury done by himself, kill any person whatsoever he is guilty of manslaughter.[123]

It is submitted that the case of what was known as chance medley (and now is submitted to be excessive self-defence) was in the mind of Foster when he described a person in a certain quarrel being exonerated for the crime if he had quitted the combat before a mortal blow was given and then having fled as far as he could with safety and urged only

---

117 1 *Hale P.C.* 478.
118 *Ibid.*
119 *Id.* at 479.
120 *Ibid.*
121 *Id.* at 478. See *R.* v. *Levett*, reported in *R.* v. *Cook* (1639) Cro. Car. 538; 79 E.R. 1064. Cook was convicted of manslaughter and Levett was acquitted but the latter case has been criticised by Foster.
Hale also discusses the correction cases; it is difficult to maintain his assertion (1 *P.C.* 474) that 'immoderate' chastisement which would be otherwise lawful results in a conviction for murder if death ensues. As to correction (which seems to have its basis in provocation, and therefore when it fails, it is murder) see: *Grey's* case (1666) Kel. J. 64; 84 E.R. 1084 E.R. 1084; *R.* v. *Keite* (1697) 1 Ld. Rayd. 138, 91 E.R. 989; *R.* v. *Bird* (1850) 5 Cox 1; *R.* v. *Turner*, Comb. 407; 90 E.R. 558; *R.* v. *Wiggs* (1785) 1 Leach 369 n; 168 E.R. 287; *Gilbert* v. *Fletcher* (1629 Cro. Car. 179; 79 E.R. 757; *R.* v. *Keller* (1864) 2 Show. K.B. 289; 89 E.R. 945; *Halliwell* v. *Counsell* (1878) 38 L.T. 176; *R.* v. *Griffin* (1869) 11 Cox C.C. 402; *R.* v. *Connor* (1835) 7 C & P 438; 173 E.R. 194; *R.* v. *Hazel* (1785) 1 Leach 369; 168 E.R. 287; Pennington, (1958) 22 J. Crim. L. 333. Cf. the trespasser cases, *supra*.
122 1 *Hawkins* P.C. 179.
123 *Id.* c. s. 22. In support he quoted *R.* v. *Mead and Belt*, *supra*.

by mere necessity killed his adversary for the preservation of his own life.[124] He also envisaged the case of a man who does not kill on such an absolute necessity and, it is submitted, when he has not retreated (which is closely bound up with the question of necessity); he classifies this as manslaughter. He states "It is presumed that the combat on both sides has continued to the time the mortal stroke was given but the party giving such stroke was not at that time in imminent danger of death."[125]

East was of the same opinion and stated that a bare fear, however well grounded, of offences being committed would be insufficient to exonerate him to the extent of justifiable homicide and that there had to be an actual danger at the time. He stated that the killing of a mere trespasser would be accorded the guilt of manslaughter unless there was danger to life. East's views as to the liability of killing a mere trespasser are wider than most of the cases[126] would leave one to believe. These cases have mostly resulted in convictions for murder.

It has been shown that justifiable homicide will not be allowed unless there has been an absolute necessity acted upon on reasonable grounds. This should allay the fears of those who consider the relaxation of the retreat rule will weaken the efficacy of self-defence.

Analogous situations to the one now claimed for excessive self-defence deserving no more than manslaughter are to be found in the over-zealous use of force in apprehending a felon. This has been taken to be manslaughter by all the authorities.[127]

An analogous case is one where the householder uses unnecessary force in resisting an unlawful execution of process. *R.* v. *Cook*[128] shows the strength and sense of this qualified defence for the accused in that case was defending his 'castle' which he had an unequivocal right to do, so long as he did not do it in an excessive manner.

The cases in the past which illustrate self-defence of an excessive nature.

Do the cases of the eighteenth and nineteenth centuries reflect the compromise verdict of manslaughter which was inferred in the old authorities from Hale to Foster and Blackstone?

At the time they were decided, it was perhaps possible to explain some of these cases in terms of provocation although this would not be the situation today when we have proportion rules which would make the decision in *R.* v. *How*,[129] for instance, an untenable one.[130]

The same can be said for the decision in *R.* v. *Odgers*[131] and *R.* v. *Weston*.[132] The latter case incorporates ingredients of provocation which makes the decision in some degree incomprehensible. Cockburn C.J. directed the jury in direct terms of self-defence which would acquit the

124 Foster, 276.
125 *Ibid;* see also 1 *East P.C.* 271.
126 *Supra.*
127 1 *Hale P.C.* 489; Foster, 276; 1 *East P.C.* 293. See the East African case of *R.* v. *Muhidini*, [1962] E.A. 383 (excessive force in an arrest by a private person).
128 *Supra.*
129 (1729) 1 Barn. K.B. 302; 94 E.R. 205. On an indictment for murder, the accused was convicted of manslaughter where he had been struck without cause and he had killed his attacker.
130 Cf. The arrest cases of *R.* v. *Whalley* (1835) 7 C. & P. 245; 173 E.R. 108 and *R.* v. *Patience* (1837) 8 C. & P. 775; M 3 E.R. 338. The charges were for non-fatal offences but there are *dicta* to the effect that it would only be manslaughter if death resulted.
131 (1843) 2 M & Rob. 479; 174 E.R. 355.
132 (1879) 14 Cox. C.C. 346.

accused with the further direction that if the self-defence was "a cloak for ridding himself of his enemy or for the venting of his anger," the offence was manslaughter. This itself does not seem tenable. The Chief Justice said:

> But if the prisoner resorted to the gun in self-defence against serious violence or in reasonable dread of it, it would be justifiable and even if there was not such violence or ground for reasonable apprehension of it, that if the conduct of the deceased naturally led him to apprehend it and deprived him of self-control, or if an assault, short of serious injury, was committed on the prisoner, then it would be manslaughter.

The jury convicted the accused of manslaughter.

It is submitted, with respect, that the summing up reflects a good deal of confusion in the judge's mind. The opening sentence of the direction dealing with justifiable homicide on the ground of self-defence is valid although self-defence against "serious violence" is a broad statement of the law when compared with the authoritative pronouncements that it must be in self-defence against a "violent and atrocious felony".

On the given facts of the case there is no evidence that the deceased was armed and it cannot be said that the judge took a more lenient view because the accused was in his 'castle'.

A second point to note is that the trial judge seems to take an objective view of the accused's apprehension of danger to his person. This must be so because otherwise it is difficult to understand why he did not direct the jury to return a verdict of not guilty. It is presumed that the jury should have wholly acquitted him if his story was believed. conduct of the deceased . . . deprived him of self-control". If this was meant to signify provocation, the evidence hardly supports such contention.

If the accused's evidence had been treated subjectively it is submitted that the jury should have wholly acquitted him if his story was believed.

The case of R. v. *Symondson*[133] is logically a more satisfactory one and the verdict of manslaughter was a good compromise in the circumstances.

The Modern Cases

It should be noted that in a modern case, R. v. *McKay*,[134] the trial judge, Barry J. explained to the jury the defence of one's person or property or the apprehension of wrong-doers and added the rider that this was lawful so long as the force used was no more than was necessary and was not disproportionate to the injury or the mischief which it was intended to prevent. He withdrew expressly from the jury any possibility of the defence of self-defence or defence of family because the deceased had offered no violence, was not armed and the accused had not tried to detain him or give any warning before he started shooting.

---

133 (1896) 60 J.P. 645. See also R. v. *Griffin* (1871) 10 S.C.R. (U.S.W.) 91 which is discussed *supra*, and R. v.*Gotti* (1919) 22 W.A. L.R. 11. Cf. R. v. *Trimarchi* (1932) 32 S.R. (N.S.W.) 431 where in similar circumstances the Full Court of the Supreme Court of New South Wales relied expressly on provocation in substituting a verdict of manslaughter. Similarly, R. v. *Ross* (1884) 15 Cox C.C. 540 and recent Scots case of R. v. *Doherty* [1954] Scots L.T. 169.

134 [1957] V.R. 560.

On the other hand there were three possible lines of justification for his acts. That he was acting in reasonable defence of his property, that he was using reasonable force in the discharge of his duty to prevent the commission of a felony or in exercise of his legal right to use reasonable force in the discharge of his duty to apprehend a man who has committed a felony in his presence.

Barry J. explained the preceding lines of defence as arising if the accused acted honestly and without improper motive or out of revenge or hatred.

As an alternative His Honour suggested that:

> . . . a citizen may seek to prevent the commission of a felony, or he may seek to apprehend a felon, and without intending to kill the felon but honestly exercising the rights which the law allows, he may cause his death by the use of more force than is reasonably necessary and in such circumstances he would be guilty of manslaughter.[135]

He was convicted of manslaughter and there is no doubt that the basis of his belief must be on the facts as he reasonably believes them to be. On this reasonable belief test McKay had exceeded his rights and was therefore not entirely exonerated.

What is the basis for reducing the liability of McKay from murder to manslaughter presuming as one commentator correctly does that he has the necessary *mens rea* and *actus reus* for murder?

Professor Morris expresses it in the following terms:

> . . . If the accused reasonably believed that he faced the situation where the law allowed him certain rights of protecting his property, or preventing a felony, or arresting a felon, or some similar justification, and he used means that went seriously beyond those necessarily required by or proportionate to the threat he reasonably believed he faced, and in doing so killed the felon he should be convicted of manslaughter.[136]

It is submitted that this really is simply a restatement of the problem. Is the basis of the defence that a mistake of fact as to the scope of a defence will lower the accused's liability?

It is very easy to become confused when terms denoting mental element are used in differing senses. This is evident from the summing-up of Barry J. in *R.* v. *McKay*:

> If one person intentionally kills another or brings about his death by the intentional infliction of grave physical injury, he is guilty of the crime of murder unless the killing takes place in circumstances which, according to law, constitute just cause or excuse. The death of a human being, if it does not constitute the crime of murder, may constitute the crime of manslaughter; if a person kills another unintentionally in the course of the performance of an unlawful act, he is guilty of manslaughter. An unlawful act may be one which is unlawful in its nature or which becomes unlawful because of the manner in which it is done. In certain circumstances the law permits force to be used, but the use of more force than is reasonably necessary in those circumstances may, if it results in death, constitute manslaughter; the use of the force would amount to an unlawful act because it had exceeded what was reasonable in the circumstances.[137]

This section of the summing-up is subject to some objections. Barry J. describes the crime of manslaughter as a killing which is done "unintentionally in the course of the performance of an unlawful act". This unlawful act may have that quality *ab initio* or becomes so because a

135 *Id.* at 562.

136 (1958) 2 Syd. L. Rev. 414 at 430.

137 Quoted *op. cit.* at 430-431.

lawful act is done in an unlawful manner." The crux of the problem is what is meant by intention. McKay has already been said to have the *mens rea* of murder because of his confessed intention to do grievious bodily harm. If this is the case then it cannot be said that McKay has acted unintentionally in performing a lawful act which became unlawful because of his excessive *modus operandi*. It is not doubted that the decisions in *R.* v. *McKay* and *R.* v. *Jackson*[138] are just ones. At the same time one is led to believe that the decision is based on an uncomplicated compromise verdict which mitigates what otherwise would be murder. Surely this is as commendable as the interpretation which has been given to cases such as *R.* v. *Larkin*.[139]

Despite the sympathy which one might feel for McKay, whose chickens had been subjected to repeated larcenies by persons such as the deceased, the facts of the case were very much against a verdict of manslaughter on the basis of excessive self-defence or any other ground. The act of the deceased was barely a felony—although it is admitted that the accused, on no interpretation of the case, would appreciate such a criticism. The deceased was unarmed whereas the accused made use of a rifle. The accused was given no opportunity to surrender himself.

The question of the commission or apprehension of a 'violent or atrocious felony' was irrelevant in the circumstances; it is submitted however that the force used in apprehending a felon was grossly excessive. There is a danger that the issues before a jury on the issue of self-defence may become too subjective.

Professor Morris described the rule enunciated in *R.* v. *McKay* in these terms in application of the facts as the jury might believe McKay reasonably saw them:

> (1) If McKay, placed as he was at the time of shooting, saw no real threat to his chickens and believed he could by other means protect his property or prevent the completion of the felony or arrest the felon, and yet determined to shoot because he at last saw an opportunity to revenge himself upon a chicken thief—murder.
>
> (2) If McKay, placed as he was at the time of the shooting, realising the threat to his property or the need to prevent the completion of the felony or to arrest the felon, used force which he thought appropriate to those purposes but which was excessive because on the facts as he reasonably believed them to be in was neither necessary to achieve these purposes nor proportionate to the threat to him from the thief, he should be convicted of manslaughter.[140]

The same writer[141] considers that juries trying cases with fact-situations similar to that in *R.* v. *McKay* will not, in practice, treat the accused to such a stringent test. He says:

> . . . as a matter of prediction of the results of cases of this nature, it can be said that a jury will convict of manslaughter in such circumstances as occur in *McKay* only when they are convinced beyond reasonable doubt that the accused's acts were *grossly disproportionate* to the threat he faced or *grossly unnecessary*,[142] to achieve the purposes which support the legal right. Nor are juries likely to expect too high a standard of judgment here.[143]

---

138 For a full discussion of this case see *infra*.

139 [1943] 1 All E.R. 217. This is especially so in the interpretation of this case by Glanville Williams in [1957] Crim. L. Rev. 293. *Cf. R.* v. *Longley* [1962] V.R. 137.

140 *Op. cit.* at 431.

141 *Ibid.*

142 Professor Morris' emphasis.

143 *Ibid.*

This is clearly a case which is described in the Canadian Criminal Code under section 205, as culpable homicide "which is not murder or infanticide" but manslaughter.

Howe's Case[144]

The same problem of excess arose in this case. The facts should be carefully noted:

> H and the deceased (M) drove in H's car to the secluded spot above five miles out of the town where they both lived, to have a drink. After they had finished a bottle of sherry M pulled open the fly of H's trousers and touched his penis. H expostulated with him and told M to get out of the car. He did so and so did H; 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 M suddenly grabbed H by the shoulder. He wrenched himself free and ran back to the car and upon opening the door saw protruding from under the 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 M who was then standing eight or nine paces in front of the car with his back to H. H's further evidence was that he believed that the attacks both in and out of the car were sodomitical attacks by M, that as M was somewhat taller and heavier than himself, he did not 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 did not think at all about whether he was likely to kill M and that it never occurred to him to get into the car and drive off.

The trial judge directed the jury that a verdict of manslaughter was possible on the ground of provocation but no other direction for manslaughter was given. On the issue of self-defence he instructed the jury that if the force used was excessive, the evidence afforded no defence at all.

The Full Court of South Australia cited R. v. *McKay* with approval but made a very full appraisal of all the cases which had discussed the problem of excessive self-defence in the past. They saw the early cases and the statute of Henry 8 merely as guides to general principles. In the context of the statutes they said that too often in the past there had been a common error that there was an absolute right to retaliate regardless of any necessity or any question of reasonableness.[145]

This appellate court formulated the following test of whether self-defence was applicable:

(i) whether the accused was subjected to a felonious and violent attack.

(ii) whether he was in all the circumstances, including his belief as to the necessities of the situation, acting reasonably in standing his ground and fighting back where he stood instead of endeavouring to avoid the commission of the felony by retreating altogether or, at least, retreating further than he did, and thus avoiding the necessity of killing his assailant.[146]

The Full Court found no authority which would help them on the question of whether a man who was subjected to a violent sodomitical attack was necessarily bound to retreat. This question was disposed of

144 [1958] S.A.S.R. 95.

145 Hale and the other commentators sought to limit the scope of this doctrine but there were wide disagreements as to the exact limit. *E.g.* see 1 *Hale P.C.* 488, 1 *Hawk. P.C.* 84, 1 *East P.C.* 298; 4 *Bl. Comm.* 180. See also the judgment of Smith J. in R. v. *McKay* [1958] V.R. at 571.

146 The Full Court's consideration of retreat has been discussed. *Supra.*

in a sensible way which has already been discussed. Despite strong protests from the Crown they had no difficulty in deciding that the test of reasonableness was to be a subjective one.[147]

Among the cases which the court discussed was the Canadian decision of *R.* v. *Barilla*.[148] The facts of the case were that:

> R lived with his wife in room 109 of a hotel in Vancouver, which room had a communicating door with room 108 in which M lived with his mistress. A drinking party had started in the two rooms. In the course of the evening R wanted M's mistress to go out with him. She was willing but M objected and Barilla, who had come in later, sided with B. During the argument B drew a revolver and fired three shots into the floor—it seemed the purpose being to frighten R. R went upstairs to get help and returned with W and F. W, F and R made considerable noise in the hall and came with a rush into room 109 where B was. In the course of a general fight which followed, W was shot in the stomach. There was evidence that there had been no general fight at all and that B had shot W when W, disregarding B's warning and threat, moved forward into the room.

B was convicted of murder but, on appeal, manslaughter was substituted.

O'Halloran J.A. held that:

> 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.[149]

In support of this the learned judge said:

> That the consideration of manslaughter is very much *ad rem* in a case of this nature is exemplified by the reasoning found in such decisions (although resting on different facts) as *Mead's and Belt's* case, *Reg.* v. *Smith; Reg.* v. *Odgers* and *R.* v. *Hussey*.[150]

In a later case [151] which purports to follow *R.* v. *Barilla* the trial judge had mentioned the question of excessive self-defence. The appeal court decided that the direction on self-defence was insufficient. The direction of the trial judge was that if the defence of self-defence failed the same evidence might indicate sufficient legal provocation to reduce the crime to manslaughter.[152]

In another Canadian case, *R.* v. *Preston*,[153] the trial judge had instructed the jury on a charge of murder:

> . . . It is for you to decide whether the accused used more force than was reasonably necessary in his own self defence. If he used no more force than

147 The court cited *R.* v. *Griffin*, (1871) 10 S.C.R. (N.S.W.) 91; *R.* v. *Rose* (1884) 15 Cox C.C. 540; *Fraser* v. *Soy* (1918) 44 D.L.R. 437; *Brown* v. *U.S. supra*, *Commonwealth* v. *Beverley* 237 Ky. 35. See also *R.* v. *Gotti, supra*, and *R.* v. *Newman* [1948] V.L.R. 61. It must not be thought of course that the question of reasonableness left to the jury is to be decided by them with blind adherence to the accused's story. If this were the case there would certainly be no need to discuss the question of the existence of a qualified defence of excessive self-defence as it would not arise. This, however, is the impression which could be gained from the bald statements of the rules as to self-defence.

148 [1944] 4 D.L.R. 344. See sections 34 and 35 of the Criminal Code. Some attention was also given to the cases of *R.* v. *Scully* (1824) 1 C. & P. 319; 171 E.R. 1213; *R.* v. *Cook* (1640) Cro. Car. 537; 79 E.R. 1063 and the American case of *Beverely, supra*. *Scully* was a case similar to but stronger than *R.* v. *McKay* which also resulted in a verdict of manslaughter. *R.* v. *Cook* seems incomprehensible in terms of the mental element which, it was decided, made the proper verdict one of manslaughter.

149 *Id.* at 347.

150 *Id.* at 347-348.

151 *R.* v. *Ouellette* (1950) 98 C.C.C. 153.

152 *Id.* at 156.
Cf. Morris [1960] 1 Adel. L. Rev. 23 at 38. Professor Morris also quotes *R.* v. *Nelson* (1953) 105 C.C.C. 333 in support of his contention that excessive self-defence is recognized in Canada. This case is a compromise verdict where the question of causation clouds the issue of excessive self-defence which is the ostensible reason for the verdict of manslaughter.

153 (1953) 106 C.C.C. 135.

> necessary in defending himself, then he is entitled to be acquitted, but if you find that he used more force than was necessary in defending himself, then you must convict him.[154]

The accused was convicted of manslaughter. The British Columbia Court of Appeal decided a new trial should be ordered. The grounds for this decision were that the accused had been unlawfully assaulted without provocation and that he was under reasonable apprehension of grievous bodily harm from the violence with which the deceased pressed his attack and, on that finding, that he believed on reasonable grounds that he could not preserve himself other than by striking the deceased with a bottle.

It was decided that the direction quoted above withdrew from the jury the question of the state of the mind of the accused when the blow was struck and that the jury may have been left with the impression that:

> . . . the issue as to whether excessive force had been used was to be determined solely by the severity of the blow and the type of weapon used, whereas in my opinion the proper direction in the circumstances was that the jury must determine whether, when the blow was struck, the prisoner had reasonable apprehension of grievous bodily harm from the violence of the deceased's attack, and then believed on reasonable grounds that he could not preserve himself from such harm otherwise than by striking the deceased with the bottle in which last mentioned circumstances the weight to be attached to the amount of force used is of less consequences than if these factors were absent.[155]

Reverting to *R.* v. *Howe*, it is noticed that the Full Court also cited with approval *R.* v. *Odgers* and *R.* v. *Symondson*.[156] "Even stronger support" is how *R.* v. *Biggin*[157] is described as authority for the rule laid down in *R.* v. *McKay* (and subsequently approved in *R.* v. *Howe*). The facts are very similar to those in *R.* v. *Howe*.

> The appellant B who was a young man of 18 came to London seeking employment. In the course of his enquiries he became acquainted with the deceased G. In a statement to the police B admitted tha he had killed G but said he did in in self defence because G made improper overtures to him and upon his refusing to comply with these overtures G had violently attacked him.

The trial judge directed the jury that if the appellant used more violence than was really necessary in the circumstances that would justify a verdict of manslaughter. This does not seem to have been questioned in the appeal court which, for other reasons, quashed his conviction for manslaughter.[158]

The Full Court in *R.* v. *Howe*, in support of the contention that this is a legitimate case of excessive self-defence resulting in a manslaughter verdict, pointed out that there were no indications in the report that there was evidence upon which a verdict of manslaughter could be found on provocation. On the excessive self-defence question, *R.* v. *Biggin* is much stronger than *R.* v. *Howe* because the appellant in *R.* v. *Biggin* claimed that when he was struggling with the deceased he felt that "if I do not do him in he would do me in".

The question must be put subjectively and it is for the jury to assess the accused's story. It should be noted that the struggle did not con-

154 *Id.* at 138-139.
155 Per Bird J. A., *id.* at 139-140.
156 *Supra.*
157 [1920] 1 K.B. 213.
158 See also *McCluskey* v. *H.M. Advocate* [1959] Scots L.T. 215. In *H.M. Advocate* v. *Doherty* [1954] Scots L.T. 169 the question of excessive self-defence was treated as attracting liability as culpable homicide on the basis of provocation.

tinue in *R.* v. *Howe* due to the accused's immediate use of a deadly weapon with sure aim. The jury could well decide in such circumstances that the accused's acts were to adopt Professor Morris' words, 'grossly disproportionate' or 'grossly unnecessary', rather than "marginally in excess" (which is the term used in *R.* v. *Jackson*).

It is noted in *R.* v. *Howe* and other cases that the necessity engendered by an attack which is answered by a killing in alleged self-defence is said to include an attack which placed the accused in danger of death or grievous bodily harm or in reasonable apprehension of the infliction of either of these forms of violence.

It is submitted that there is some doubt at common law whether grievous bodily harm should be included as a circumstance in which an absolute necessity arises. By definition an absolute necessity arises only if the accused is in a position where his instant death is envisaged or he has reasonable grounds for surmising that such is the case. This is not the interpretation which is intended in sections 34 and 35 of the Canadian Criminal Code.

It is realised that the courts should not scrutinize too closely the necessity on which an accused has acted; on the other hand, it is submitted that excessive self-defence is an appropriate defence to use where the accused has killed when he was not confronted with an appropriate necessity. It may well be that the most deserving case for reduction to manslaughter is the one where the accused was offered or apprehended grievous bodily harm but not fatal harm.

This result would be more likely to lead to justice than a strict reliance on the distinction between felony and misdemeanour which weighed heavily in the final determinations in *R.* v. *McKay* and *R.* v. *Howe*. Would the position have been very different if McKay's victim had been a misdemeanant and the deceased in *R.* v. *Howe* had been considered as simply attempting to procure an act of gross indecency?[159]

The final conclusion arrived at by the Full Court in *R.* v. *Howe* was 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 murder.[160]

In a general statement of the principle laid down in *R.* v. *Howe* the Full Court said:

> 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.[161]

It is submitted that this statement, unlike a parallel one by Barry J. in *R.* v. *McKay* is unashamedly indicative of a compromise verdict with

---

159 A misdemeanour punishable with imprisonment not exceeding three years; Criminal Law Consolidation Act (S.A.) S. 71. Cf. s. 69, which provides for imprisonment not exceeding ten years (and a discretionary whipping) for buggery.

160 [1958] S.A.S.R. 95, 121-122. The Court had decided that "an attempt to commit sodomy by force against the will of the person assaulted or threatened is to be regarded as a violent felonious attack." See comments on the S.A. Criminal Law Consolidation Act where buggery is not defined as a felony.

161 [1958] S.A.S.R. 95, 122.

no mention, in fact an implied negation, of any rationalisation or setting down of a legal rule or test to be applied to decide if the case falls within manslaughter upon excessive self-defence.

Excessive Self-Defence and Provocation

How does the Full Court reconcile the rule in *R.* v. *Howe* with the 'defence' of provocation?

The Crown on appeal had suggested that the proposition of manslaughter on excessive self-defence was inconsistent with the House of Lords decision in *Mancini.* v. *D.P.P.* The trial judge in the latter case had directed the jury that if Mancini was disbelieved on his evidence that the deceased was advancing on him with an open pen knife then self-defence must be rejected, yet the circumstances might still justify the jury in returning a verdict of manslaughter on the basis of provocation.

The Full Court explained that the question of excessive self-defence with manslaughter as a result was not a possibility in *Mancini* v. *D.P.P.* for two reasons. First, the question was never raised in the arguments before the House of Lords. Secondly the House of Lords did not find it necessary to refer to the possibility of a verdict of manslaughter on a plea of self-defence, because, on the assumption that the deceased in *Mancini* v. *D.P.P.* did not have a knife in his hand, the fatal blow with Mancini's knife was struck in the course of a common brawl and there was therefore no basis for Mancini to say that the blow was struck in reasonable apprehension of an unprovoked threat of life or limb or in an attempt to prevent the commission of a violent and atrocious felony.

One objection to this is that the tests applicable to self-defence and provocation are to be treated differently. It is very difficult to differentiate between them in the necessarily simple and succinct charge to the jury; however, it is submitted that in relation to the defence of self-defence, an accused such as Mancini is entitled to the jury's consideration of his evidence that he had a reasonable apprehension of danger because he had reasonable grounds for thinking that the deceased was confronting him with a knife. The proportion test applied in *Mancini* v. *D.P.P.* is admirably suited to a verdict of manslaughter on excessive self-defence.

It is conceded by the Full Court that at one time excessive self-defence—manslaughter may have been treated as a species of provocation but that this is unlikely to succeed at common law on the rules for provocation laid in *Mancini* v. *D.P.P.* and *R.* v. *Holmes.* In support of this it is said that many cases in self-defence or defence of property or in prevention of a felony which have resulted in manslaughter verdicts have lacked the ingredient of 'loss of control'.[102]

The principle enunciated in *R.* v. *Howe* was considered by the Court in that case to have been ignored by the commentators.[103]

---

102 [1958] S.A.S.R. 95 at 122. The examples cited in support are of doubtful authority. *R.* v. *Biggin* and *R.* v. *Odgers, supra* are probably the strongest. The others can be adequately explained in terms of lack of intention *R.* v. *Dakin* (1828) 1 Lew. 166; 168 E.R. 999; *R.* v. *Scully* and *R.* v. *Symondson, supra,* or there is mention of heat of blood which, it is submitted, amounts to loss of control, e.g. *R.* v. *Mead and Belt, supra;* cf. *R.* v. *Weston* (1879) 14 Cox C.C. 346.

103 *Cf.* the analysis *supra.*

Another view is taken on the question of provocation in relation to excessive self-defence:

> It is possible that it was looked upon as a species of provocation, the proof of the attack being accepted as[164] proof not only of provocation but also of loss of control.

On this basis it was presumed that the House of Lords in *Mancini* v. *D.P.P.* and *R.* v. *Holmes* was only considering the question of provocation in relation to killing as "the outcome of a quarrel or fight . . . of which the slayer may or may not have been the instigator, and the law of provocation as the outcome of an unprovoked violent and felonious attack is untouched by those decisions."[165]

For these reasons, the Full Court added:

> . . . we do not consider that those decisions bind this Court as decisions dealing exhaustively with the rules as to what circumstances may reduce killing from murder to manslaughter, as distinct from those which reduce killing to justifiable homicide.[166]

Professor Morris[167] submits that the opinion of the High Court and Full Court as to the lack of application of *Mancini* v. *D.P.P.* to the *McKay-Howe* situation means "that 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 received) 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."

He concludes his remarks with the telling comment:

> . . . 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.[168]

The principle laid down in *R.* v. *McKay* has been followed in the subsequent Victorian case of *R.* v. *Bufalo.*[169] Smith J. decided the defence is open if the accused produces evidence that he was to some extent defending himself. The learned judge pointed out that:

> He may have had other purposes in addition, such as the purpose of retaliating or punishing or injuring his attacker but those other purposes must not have been his only purposes. One of his purposes in doing what he did must have been genuine purpose of protecting himself from injury by his attacker.[170]

For a conviction of murder it must be proved that the accused was not acting in self-defence but entirely for other purposes.[171]

The scope of the defence appears to be widening.

---

164 [1958] S.A.S.R. 95 at 122. *Moreland on Homicide* 92 submits that the roots of both provocation and excessive self-defence are to be found in chance medley; the difference between them being that the former is based on heat of passion reducing the crime to manslaughter while excessive self-defence raised to manslaughter from excusable self-defence, is based on the fear of life which is unwarranted or overcompensated by too much violence in the circumstances.

165 *Id.* at 122; similarly see also Menzies J. in 32 A.L.J.R. at 221. It is difficult to see how this can be maintained in its entirety. It could hardly be said that *R.* v. *Holmes* was a case where the killing resulted from the "outcome of a quarrel or fight".

166 *Id.* at 122.

167 *Ibid.* As has been pointed out beforehand, the jury might have disbelieved Mancini's story that the deceased was armed with a knife and yet believed Mancini when he said that he thought he was being attacked and was in grave personal danger. See also *R.* v. *Packett* (1937) 58 C.L.R. 190.

168 [1960] 1 Adel. L. Rev. 23 at 42. See also Briggs F.J. in *R.* v. *Jackson* [1962] R. & N. 157 at 166.

169 [1958] V.R. 363.

170 *Id.* at 363.

171 See also *R.* v. *Haley* (1959) 76 W.N. (N.S.W.) 550.

It can be argued that the decision of the Privy Council in *R. v. Kwaku Mensah*[172] was one which reflects more of a verdict of manslaughter arrived at on the basis of excessive self-defence than the pronounced one of provocation.

The implication from the opinion of the Privy Council is that the Board was not thoroughly convinced by the fulfillment of all the requisites for the 'defence' of provocation.[173]

It should also be noted that Lord Goddard C.J. considered a stabbing received in defence of oneself or one's property as amounting to provocation. It is much more advantageous to an accused to classify his retaliation in such circumstances as justifiable under a defence of self-defence. It was decided that self-defence was not necessary as the deceased was fleeing at the time of the killing. It is submitted that the natural basis for the verdict of manslaughter is on the ground of excessive self-defence.

In a Scottish case, *Crawford* v. *H.M. Advoate*,[174] Lord Keith expressed concern at the "growing" number of cases in which self-defence is raised where the "*species facti* are not really apt". His Lordship also stated that some day the courts may have "to examine rather more closely the limits of the plea of self-defence and its relation to the plea of provocation".

His Lordship continued:

> The classic examples of self-defence . . . are cases where a person is in apprehension of immediate danger to his life, or cases where self-defence has been used in resistance to attempted rape, or to a house-breaker, or to a robber and it may be also that where a person has reasonable apprehension[175] of immediate serious injury to his body, leading to permanent injury or demembration he may be entitled to rely upon the plea of self-defence. Outside these categories of cases, self-defence is, I think, frequently used as a misnomer for provocation . . . I cannot assent to the view that a person who has some reason to apprehend a remote danger to himself from a possible assailant is entitled to seek out that assailant and to kill him in order to remove a possible and, it may be, an unfounded fear of danger to himself. It would be to go far beyond anything that has ever been said or decided and indeed to fly in the teeth of the ratio of self-defence in the case of homicide.[176]

Many cases where the accused has been convicted of manslaughter and which would now be classified as excessive self-defence have in the past been loosely treated as cases of provocation or reflect a pure compromise verdict. This is seen in the trespasser cases,[177] the correction cases[178] and where an officer in execution of his duty has used excessive force or has exceeded his duty.[179]

Jackson's Case

The Federal Supreme Court *per* Briggs F.J. made a very thorough survey of the law relating to self-defence provocation and chance medley.

---

172 [1946] A.C. 85.
173 See particularly *per* Lord Goddard C.J., *id.* at 93.
174 [1950] S.L.T. 279.
175 Note the doubt expressed. See discussion, *supra*, on this question.
176 Quoted at (1951) 15 J. Crim. L. 92. Also note *R. v. Miller* (1956) 20 J. Crim L. 329 where self-defence and provocation were raised; it was found that excessive force was used but the jury found the accused guilty of manslaughter only on the ground that the force used was not such from which murder could be inferred.
177 See Hale, *supra*.
178 *Supra*.
179 See *R. v. Foster* (1825) 1 Lew. 187; 168 E.R. 1007. This also applies to the 'gamekeeper cases'; in particular see *R. v. Eisley* (1844) L.T.O.S. 6.

The Court found strong African support[180] for the final view which they took of the case which is epitomised in the following:

> Leaving aside the cases where there is a real and imminent danger of death to the accused, it may be perfectly reasonable in some cases for him to cause, and intend to cause, injuries sufficiently severe to come within the category of grevious harm. If without heat, but calmly and deliberately, he does contrary to his intention cause death, the defence of provocation is not open to him, for he fails in the first requirement of "heat of passion" or "loss of self-control". (The judge decided these were not necessary in self-defence.) But if his acts are done in good faith and are only marginally in excess of what would be wholly excusable it seems contrary to all ideas of justice that he should be convicted of murder.
>
> If the acts of the appellant are considered on the footing that the last of the three blows was delivered before the deceased was incapacitated, I think the correct conclusion is that, although much more was done than was strictly necessary for legitimate self-defence, there was nothing in the acts of the appellant themselves, or in the surrounding circumstances, which establish malice aforethought, and the appellant was not guilty of murder but only of manslaughter.[181]

While the Court saw from the wording of section 3 of the Homicide Act (U.K.) 1957 and from the cases decided since that time[182] that an accused may successfully claim provocation although he had sufficient malice aforethought, the actual decision in *R.* v. *Jackson* would appear to be rationalised by Briggs F.J. on principles of conventional manslaughter. In the final analysis however, it is submitted that this view of the mental element in the case is very similar to that which applies in provocation.

Briggs F.J. referred to the assault being a lawful act and because of this quality it would not be proper to infer malice aforethought when the accused actually killed. Is one to presume from this that "the assault" refers to the accused's initial and justified act of repelling the deceased? Does this mean that the only act which is taken into account is that which is in excess of justifiable self-defence?[182a] This seems unworkable in the same way in which the rationalisation of Barry J. in *R.* v. *McKay* was considered contrary to the established principles of manslaughter.

It would appear that the accused's act reflected the intention to kill which he unreasonably thought he had a right to do in self-defence. The real basis of this excess has been taken in some cases[183] to be due to lack of self control in the heat of the moment. This has the essence of chance medley rather than any justification in mistake of fact. It is reduced to manslaughter by the benignity of the law as is a killing under provocation.

It is submitted therefore that the judgment in *R.* v. *Jackson,* as well as the other cases discussed, should be taken to be pure compromise verdicts. This is reflected in the very cases which are cited by the court in *R.* v. *Jackson.* In *R.* v. *Detsera*[184] the Federal Supreme Court of

---

180 *R.* v. *Zabroni* [1956] R. & N. 195; *R.* v. *Ngoilale* (1951 18 E.A.C.A. 164; *R.* v. *Shaushi* (1951) 18 E.A.C.A. 198; *R.* v. *Hau,* (1954) 21 E.A.C.A. 276; *R.* v. *Yozefu Engichu* (1954) 21 E.A.C.A. 294 and *R.* v. *Detsera* [1958] R. & N. 51.

181 [1962] R. & N. 157 at 167.

182 *R.* v. *Porritt* [1961] 3 All E.R. 463; *R.* v. *Bullard* [1957] A.C. 635 and the forerunner decided by the Judicial Committee of the Privy Council, *Perera* [1953] A.C. 200. See also the latest decision, *R.* v. *Lee Chun-Chuen* [1962] 3 W.L.R. 1461.

182a Is there some merit in this argument by virtue of s. 26 of the Canadian Code?

183 *E.g.* a Scottish case cited by Briggs F.J.: *H.M. Advocate* v. *Kizileviczius* [1938] S.C. 60.

184 *Supra.*

Rhodesia and Nyasaland cites and approves another African case.[185] In the case cited the judge had referred to the rule of excessive self-defence as one which was "not logical" and that it was an exception to the rule that intentional unlawful killing is murder.

The Court in *R.* v. *Detsera* criticised the practice of courts in treating intention as excluded in provocation cases. For the court Tredgold C.J. said:

> Yet in many cases the accused unquestionably means to kill the deceased. It is more satisfactory, in such cases, to accept the fact that intention to kill is present, and to recognise that, despite the presence of this intention, the offence may be reduced to culpable homicide in certain established cases in which the circumstances show that the intention was not deliberate or calculated . . .
>
> The point at which a verdict of murder should be found cannot be mathematically determined.[186]

It is submitted that the attempts to put the mental element in excessive self-defence on a formal basis is confusing and, as Professor Morris has said, adds to the technicality of the already unsatisfactory definition of malice aforethought.[187] It is better to recognize that the law has made a concession to human nature and thereby introduced a new, although 'qualified',[188] defence to murder.

185 *R.* v. *Koning* 1953 (3) S.A. 220.
186 [1958] R. & N. 51, 58.
187 [1960] 1 Adel. L. Rev. 23, 39.
188 To borrow Professor Morris' term, op. cit.