A NEW QUALIFIED DEFENCE TO MURDER

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"If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter—not murder." This proposition is taken from the judgment of Lowe J. in McKay, a Victorian case where excessive and lethal force was used in defence of property. In the subsequent case of Hourse, where excessive and lethal force was used in self-defence, the South Australian Court of Criminal Appeal accepted the proposition which Lowe J. had formulated in McKay, though they recognised "that this principle, which we find implicit in the early cases, and which has been stated recently in the cases to which we have referred, does not appear to have attracted the attention of the textbook writers and commentators, nor has it been the subject of consideration by any appellate court in England." The same principle of law has recently been applied in the Victorian case of Bula and by the Court of Criminal Appeal of New South Wales in Holley.

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

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

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1. McKay (1897) V.R. 460 at 464; (1897) A.L.R. 464 at 468.
2. Ibid.
3. See the writer's "The Main Chicken Thief" (1955), 2 Sydney Law Review 474.
5. (1930) R.A.S.B. 88 at 122.
7. (1900) W.N. (N.S.W.) 368.
8. Reed v. Jones (1882) 19 Vic. App. 289; Bower v. Winter (1901) 526 Mo. 114, 44 S.W. 127; Bower v. Commonwealth (1889) 99 Mo. 120, 10 S.W. 485; Brown v.云南 (1815) 17 Vict. C.R. 316, 140 S.W. 746; State v. Pendiou (1890) 10 Mo. 809, 4 S.W. 14; State v. Cooper (1805) 101 Mo. 124, 125, 66 S.W. 1525, 1820; 1 Bishop, New Criminal Law, sections 894-977 (5th ed. 1886); R. W. Yorkin, Criminal Law, pp. 905-906.
entitle the defender to an acquittal; and 'imperfect' if it merely reduces the grade of his offense to manslaughter. It is, however, misleading analysis to refer to an "imperfect" right, if its exercise may lead to criminal liability. Nor is the concept of a "qualified or conditional privilege" any less incriminating. Once the right or privilege of self-defense is insufficient to lead to the acquittal of one who has killed while purportedly exercising that right or privilege, no adjective can preserve the concept of right or privilege for purposes of determining whether the accused is guilty of murder or manslaughter. What we are in fact considering in such a case is a problem of mitigating circumstances akin to that of provocation. Here, as for provocation, it is proper to talk of a "qualified defence", not of a "qualified right or privilege."

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

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

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

At first light on the 9th September, 1966, an alarm rang in McKay's house. McKay took a .32 caliber repeating rifle, followed a path between the pens to conceal himself, and reached a point about 140 feet from the intruder, whom he could see bending down looking into a fowl pen. McKay rested his rifle on the top strand of a wire fence. Then, in McKay's words to the police, "I aimed the rifle at him to hit him between the hips and the feet and I fired. He turned and started to run and I fired a second time. When I fired a second time he dropped three fowls he was carrying; he didn't stop and I fired three more times. . . . I didn't think I would kill him. I only wanted to wound him". McKay said the police he did call out or try to detain the intruder before he fired because he "didn't want him to get away", and, after the usual warning and an invitation to make a formal statement, said: "I will make a statement. I shot him and I meant to shoot him. He had to go to be shooting the fowls'. Towards the end of the statement McKay said: "When I fired at this man, I aimed at him and I wanted to wound him but not to kill him. I consider I am entitled to wound a man who was stealing fowls on my property, especially when we have notice up 'trespassers prosecuted'".

One of McKay's shots entered the thief's right arm, pierced the heart and killed him. Which of the shots was the lethal one was not established; it was probably not the first, and the trial judge seemed to think it was the last. McKay was tried for murder before Mr. Justice Barry of the Victorian Supreme Court who concluded his direction to the jury as follows:

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

McKay was convicted of manslaughter. Mr. Justice Barry's precise direction that excessive force used in protecting property, or preventing a felony, or arresting a felon, or a combination of these rights, should lead to a conviction of manslaughter and not murder was accepted by the Victorian Court of Criminal Appeal,10 in L'Eves, Donna and Smith 11. The trial judge ruled that, by virtue of s. 8 et seq of the Crimes A ct 1928 (Vic.), the intruder was entitled upon a felony in stealing chickens.12. Transcript at 74.

8. R. M. Foskett, Criminal Law, 164.
to prevent the commission of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder.79

This statement of the law was approved by Dixon C J, McTear, Fullagar and Menges JJ, when it was tested on appeal to the High Court,16 while one member of that court, Taylor J, formulated the law in wider terms than the South Australian Court of Criminal Appeal. Mr. Justice Taylor regarded it as "sufficient if it appears that what the accused did was done primarily for the purpose of defending himself against an aggression and the jury should be instructed that unless satisfied beyond reasonable doubt that this was not so a verdict of manslaughter should be returned."78

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

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

A. "Necessity" and "Provocation".
B. Authority for Self-Defence as a Qualified Defence.

12. The phrase "beneath", preceding "believe", in the above statement of the law is unnecessary. One cannot have a "beneath belief". It may overreach the purpose of stating a jury that he may use the private "beneath belief" so as to arrive at any supposed right of the accused to use the cause in a prosecution. See John Lawrie. Vol. 53, No. 1, March, 1969, at p. 175.
17. (1951) 28 A.L.R. 214 at 217. Menges J suggested a formula closely akin to that propounded in the Court of Criminal Appeal as follows: "it is manslaughter and not murder if the accused killed another in self-defence in a way which was reasonable in the circumstances." (1958) 8 A.L.R. 212 at 211.
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the force used is necessary, that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is disproportionate to the injury or mischief which it is intended to prevent."

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

"Necessity" and "proportion" are the governing principles, on which those defenses, or absolute defenses, rest; but they do not in themselves assist us, or in finding an answer to the following question. Given that the accused must have acted, if he is to be acquitted, within and under the necessity of the occasion, it is to be tested:

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

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

Is it clear that (a) is not the test for there is compelling authority that if the accused can show necessity for his conduct under (b) he will be acquitted even though (a) were determinative he would be convicted? Misdemeanor of larceny may be the formulation of a defense: 22


23. (1867) 44 Ky. 420, 15 S.W. 563.


25. "This is often phrased "in the face of the jury finds the accused reasonably and literally believed them to be," As this previously been pointed out, see F. & 10, in a series of books this side relating to the amount in the trial, but not necessarily to a more restricted phrase to use in directing a jury.

26. Room (1864) 9 C.C. S.S., per Layen, J. Griffin (1871) 9 S.C. (N.S.W.) 51, particularly per Stephen, CJ of 100. Personet (1868) 1 P. & R. 16, and see A. V. Dicey, Law of the Constitution (9 ed. 1958) 490 in this case, 191 (1841) 2 Mac.R., 78, the argument and Sibra, n.4. For Canadian authority see Prior's (1853) 106 C.C.C. 105 and cases cited by the Court of Appeal of British Columbia.
where the defence would be lacking on the facts as they were. Exceptionally, an accused would have a defence under test (a) where he lacked it under (b), and in such circumstances he should be convicted. Thus, in Daddo,27 a constable observed one Waters carrying wood away from a copse and called on him to stop. Waters ran away. Daddo shot at and wounded him. Daddo was convicted of wounding with intent to do grievous bodily harm pursuant to a direction by Erie J. 'the effect of which was to deny him any justification for his felonious act. Waters' act was in fact felonious in that he had twice previously been convicted of stealing wood and by statute such stealing after two previous convictions was a felony. However, these previous convictions of Waters were unknown to Daddo and, further, it was accepted that he did not know the different rules for arresting a felon and a misdemeanant. The Court for Crown Cases Reserved28 agreed with the direction given by Erie J. and affirmed the conviction, saying, "The prisoner was not justified in firing at Waters, because the fact that Waters was committing a felony was not known to the prisoner at the time. " Here was a situation where the accused was justified on the facts as they were but not on the facts as he reasonably believed them to have been. Test (b) being regarded as determinative, he was rightly convicted.

Can the next step be taken, and test (c) substituted for (b)? Should the accused's alleged justification or excuse be based on the facts as he believed them to be even though a reasonable man proved as he was not have reached that conclusion? There is some authority29 and a growing body of opinion30 favouring an affirmative answer, but at the present stage of the development of the law it would seem that the accused's belief must be an objectively reasonable one if it is to lead to a verdict in his favour. This involves the possibility of punishing a man because of his stupidity which alone may explain his failure to reason as would the average man placed as was the accused, but these are jury issues which we are considering and it may be unfair to expect of juries an understanding of these fine psychological distinctions and lacking in confidence in them if we fail to realise that they tend to reach broadly by just conclusions ignoring such close analytic issues. At all events, the unreasonableness of the accused's alleged belief will be relevan and persuasive evidence that he did not have that belief, as a matter of judicial direction to the jury a summing-up in which they are directed to determine the accused's criminal liability on the facts as they find he reasonably believed them to be is

27. (1890) 4 Den. 25.
29. Pullen v. Sparkes (1872) 2 Q.B. 253, per backpack, C.J. (1886), per Lord Halsbury, C.J.
30. 31. Ono, Williams, "Strikes in Criminal Law" (1895) 24 Mod. L.R. 669.
31. Precise Williams, "Criminal Law—The Criminal Part" (1865) 156-171.

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

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

After considering the authorities for and against the rule in House and McKay, the limits of this rule (which involves drawing a line between excessive defensive force and aggression based on a mere pretext of defence) will be considered, but there is no form of excuse which has received centuries of judicial attention which should now be discussed—the failure to retreat before using lethal defensive force.

It was not until the middle of the thirteenth century that the defences that the killing was per inueniam or ad defendendum were of any effect whatever, and even then their effect was not on the conviction itself but only on the exercise of the Royal Prerogative of pardon.32 As the granting of pardons in these cases hardened into a practice, the procedure for their automatic grant required the jury to find that the death occurred ad defendendum or per inueniam. These defences came by virtue of the Statute of Gloucester in 127980 to form the basis of the law of excusable homicide. From the earliest days of the doctrine of ad defendendum, first as a foundation for the favorable exercise of executive discretion and later as a finding by the jury, it seems to have been established that a man must not use lethal force in his own defence unless he can escape in another way, and that as a matter of practical criminal administration he should be denied this defence if he could have retreated. Holt's case refers to a case decided in the reign of Edward III which clearly illustrates the rigidity of this condition of the defence ad defendendum. "At the great deliver at Newgate before Kniets and Lodell it was found by verdict that a chaplain
killed a man as defending it. And the Justices demanded to know how: and the Jury said that the deceased pursued him with a stick and struck him, and the accused struck him again so that he died; and they said further that the accused could have fled from his assailant if he had wished. And the Justices adjourned him to be a felon, and said that he was bound to flee as far as he could to save his life.36

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

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

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

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36. 8 Holdsworth, History of English Law (2nd ed.) 230.
37. "We know what a difference it makes in the law of homicide when there is a conflict of evidence as to whether the deceased went further than he was justified in doing; not a categorical proof of guilt." 8 Holdsworth, History of English Law (2nd ed.) 230.
38. 64 The Times (1841) 6 Cr. App. R. 106.
39. 64 The Times (1841) 6 Cr. App. R. 106.
40. 64 The Times (1841) 6 Cr. App. R. 106.
42. (1968) 1 A.C. 568, 585 E.R. 106.
44. (1968) 1 A.C. 568, 585 E.R. 106.
47. "The court shall be able to draw any inference of the kind or the other evidence that the deceased did not the accused was a felon, and said that he was bound to flee as far as he could to save his life."
Nevertheless substantial authority for this qualified defence of self-defence does exist and the Australian courts have invoked some of that authority in defining this new role in the law of homicide. The main English cases will be considered and then certain Australian, Canadian and United States authorities.

In 1840 Cook\(^45\) was indicted for the murder of Marsh, a sheriff's officer. Marsh with others had come to Cook's home to arrest him pursuant to a warrant capias ad satisfaciendum. They hid all night in Cook's stable and in the morning approached his house and called on him to surrender to them, announcing that they had writs for his arrest. Cook refused to open the door and ordered them to depart. The sheriff's officers then broke a window and afterwards started to force the door, breaking a hinge in doing so. Cook then shot at Marshal, killing him. It was decided in the King's Bench that on these facts Cook was guilty of manslaughter and not of murder. All six judges of the court adhered to their opinions that though Marshal, the sheriff's officer, was in those circumstances doing an unlawful act in breaking into Cook's home to execute a civil process and could therefore properly be resisted by force "yet they all held, that it was manslaughter: for he might have resisted him without killing him; and when he saw him and shot voluntarily at him, it was manslaughter".\(^46\)

Scally\(^47\) is a less compelling authority but it does lend some support to the rule applied in House and McKay. Before Baron Garrote at the Gloucester Assizes in April, 1834, Scally was indicted for manslaughter. Scally's confession was the only evidence against him. It was to the effect that he had seen a man standing "on his master's garden wall in the night, lashed him; and the man said to another, whom the prisoner could not see, Tom, why don't you fire? That to (the prisoner) lashed them again, and the same person said, Shoot and he'll be damned", whereupon he fired at the legs of the man on the wall, which he missed, and shot the deceased, whom he had not seen from his being behind the wall." Garrote directed the jury that "any person set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter."

For two reasons Baron Garrote's direction in Scally is a less secure foundation for the rule in House and McKay than is Cook. Firstly, Scally was indicted for manslaughter not murder. In that the prosecution lay within the discretion of the Crown, it is clear that this discretion extended to prosecuting for the lesser and included offence of manslaughter even if in law a murder conviction was proper. The question of excessive and lethal defensive force as creating liability for manslaughter and not murder did not therefore necessarily arise.\(^48\) Secondly, Baron Garrote's use of the word "rashly" in his direction to the jury might be thought to indicate his application of a theory of liability based on the accused's recklessness. The case does, nevertheless, support the House-McKay rule and it is submitted that if the facts in Scally recur the case should be decided on the basis of that rule.

The cases of Whalley\(^49\) and Patience\(^50\) expressly held that excessive and lethal force used to resist an unlawful arrest creates liability for manslaughter and not for murder.

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

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

Olgiata\(^53\) raised the issue of failure to retreat prior to taking forceful measures of self-defence. Crosswell J. in directing the jury, said:

45. (1840) 10 Car & P 221; 117 E.R. 763.
46. Ibid., 117 E.R. 763.
47. (1843) 1 C.B. 513; 171 E.R. 1213.
53. Ibid., 173 E.R. 763.
“Now in order to render a case of homicide, committed with a deadly weapon, lawful on the ground of self-defence, it must appear that the party acted as far as he possibly could, and then only used the weapon to avoid his own destruction. It is impossible to contend that the prisoner was so driven to use the scythe in this case, the offence would have amounted to manslaughter if death had ensued”. From the context it is clear that Cranwell J. was not meaning by those words that it would be manslaughter at least, but was holding that in those circumstances the offence would be manslaughter and not murder.

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

In Symonds v. Griffiths, Sir Horace Aveye, prosecuting for the Crown, adopted a similar view of the law. In a similar case, Griffiths was convicted of manslaughter, not murder, and, although the jury’s answers to the questions indicated confusion in their minds as to the reasons for that decision, the Chief Justice’s acceptance of this qualified defence of self-defence, where excessive and lethal force is used, is of significance.

55. (1879) 14 Cox C.C. 245.
56. Id. at 381 (Inns of Court added).
57. In a lengthy footnote, the reporter, W. F. Pickavance, seeks to explain the difficulty by referring to the law of provocation and not of excessive self-defence. His explanation is confusing and not sufficiently supported with the plain words of the Chief Justice’s carefully prepared direction. It is true, of course, that in the context of self-defence, the common law of manslaughter, where excessive and lethal force is used, is covered in the Chief Justice’s direction.
59. (1884) 3 S.C.R. 171, 1 E.R. 1813.
60. (1855) 9 Cox. & P. 52; 172 E.R. 735.
61. (1950) 1 K.B. 218.
62. Id. at 219 (Inns of Court added).
63. (1871) 10 S.C.R. (N.S.W.) 81.
submitted for the prisoner, that he had fired under a nervous but reasonable apprehension of danger.”

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

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

Canadian decisions are like effect. In Barkla56 the Court of Appeal of British Columbia quashed a conviction of murder because of the trial judge’s failure to direct the jury "that excessive self-defence would justify a manslaughter verdict".56 The same court had in the decisions in 1950 in Ouellette57 and in 1950 in Nelson58 established this doctrine.

A recent case before the High Court of Justiciary, McCuskey v. H. M. Advocate,59 with facts similar to those in House, indicates that in Scot-

land verdicts of culpable homicide are accepted where the accused cannot be acquitted of murder because he has used "cruel excess" in defending himself.

There is thus an ample authority to support the rule in House and McKay.

After stating, in House, that excessive and lethal self-defence should lead to a conviction of manslaughter, the Court of Criminal Appeal of South Australia continued, "We regard the situation which we have described as a case of unlawful killing, without malice aforethought, for although the killing may clearly intend to inflict grievous bodily harm as his assailant, and if necessary, to kill, his state of mind is not fully that required to constitute murder."60 It is submitted that the above analysis is not helpful. It is misleading in the same way as Viscount Simon’s dictum in Holmes v. Director of Public Prosecutions61 suggesting that provocation "negates malice", is misleading and was in effect rejected by the Privy Council in A-G for Ceylon v. Perera.62 It involves even more technicality than at present exists in the definition of "malice aforethought". McKay, House, and many of the other criminals whose cases have been considered above undoubtedly had the mens rea of murder when they killed; merely clearly intended to kill. It is recognised, of course, that the same result is reached if after stating each type of mental intent (intent to kill, to inflict grievous bodily harm, to perform an act of violence in the course or in furtherance of a felony of violence, forcibly to resist arrest) which makes up that "malice aforethought" of unlawful killings which the law declares to be murder, a phrase is added, such as, "the accused not having certain limited rights to defend himself when holding this intent", but this does not lead to clarity of analysis. If the rule defined in House and in McKay applies not only to self-defence and the defence of property, but also to situations such as preventing a felony, arresting a felon, protecting others (and, as will be submitted, also to other defences such as necessity and duress) it would seem sensible analysis to avoid adding yet more technicality to "malice aforethought" and preferable to recognise that a new qualified defence to a charge of murder has emerged.

So far only supporting authority has been discussed. What of authorities opposing the rule in House and McKay? Certain dicta in the judgment of the Lord Chancellor, Viscount Simon, in Manchester53 appear to
The appeal in Mancini concentrated on the question of provocation and its relationship with the rule in Waugh v. Commissioner of Police. What was not mentioned in Mancini was L.C. of "chance-medley." What was also mentioned in Mancini is L.C. of "chance-medley." Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up the facts, to add appropriate or any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. (1942) A.C. at 7.)
the jury in Mancini should have been directed to determine whether Mancini honestly and reasonably believed himself to be the subject of an attack which might seriously injure him and, if that was his belief, to direct them to bring in a verdict of manslaughter.

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

C. LIMITS OF THE QUALIFIED DEFENCE

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

This is a problem which, under our system, is typically suited to being worked out gradually in its details in the case law. The operative principle was clearly stated by Hawkins.48 "There must be no malice coloured under pretence of necessity, or a mere pretext of self-defence cloaking a pre-existing intent to kill, it is necessary to distinguish between motive and intent.49 The accused may have hated the deceased for years, may rejoice in his death and feel his desire for revenge assuaged, yet if at the time of the killing he honestly faced a self-defensive situation he should be acquitted if he used proportionate means of self-defence and consisted of manslaughter only if he did not. His motives are irrelevant to the decision if the killing was in fact commonly related to self-defensive action. Furthermore, a consideration of the accused's motives may well assist in deciding whether he was indeed defending himself or whether it was a mere "pretence of necessity" concealing a premeditated killing.50 It is likely that in this qualified defence is further refined in the case law it will be found that temporal considerations are of significance. To call it forth, the jury must not disbelieve the accused when he says that he honestly and reasonably saw himself as in a self-defensive situation. They will be inclined to disbelieve him if there is evidence of prior planning by the accused to provoke the situation or if there is evidence of a substantial time-lag between the threat to the accused and his lethal action. They will tend to require, in Mr. Justice Holman's phrase, that "a clear and present danger" faced the accused. The problem is, of course, close to that considered under the qualified defence of provocation—provoked delay in responding to the insult or threat will tend strongly to disprove the operative effect both of provocation and of self-defence.

The limits of this qualified defence of self-defence will be determined mainly by the facts of each case and it is unlikely that a rule more precise than Hawkins' "pretence of necessity" proposition can ever be formulated. In House, the Supreme Court of South Australia carefully confined their statement of the rule to the facts they faced and limited its operation to "a person who is subjected to a violent and felonious attack and who [killed] in expediency or in self-defence to prevent the consummation of that attack."51 Yet the same rule had been earlier applied in McKay where, though the accused was resisting a felony, no violence or threat of violence to the person involved.

In argument in House counsel for the Crown submitted that on one view of this qualified defence "if a person threatened another with some corporeally harmless assault, such as a push or a slight kick, and the latter, in order to protect himself from the threatened assault, shot or killed the former, he would be guilty of mere manslaughter."52 This argument was met by the Court of Criminal Appeal by confining the defence to situations "where there is a danger to life, or grave bodily injury is threatened, or death or such injury might reasonably be apprehended, or the commission of a forcible and atrocious crime is to be prevented; in other words, to cases where, if the force applied were not excessive, and death ensued, the homicide would be justifiable and no crime would be committed."53

On the appeal to the High Court in House, Mr. Justice Taylor was critical of the approach to this aspect of the qualified defence by the South Australian Court of Criminal Appeal and offered the following. "It is, in my view, sufficient if it appears that what the accused did was done primarily for the purpose of defending himself against an aggressor..."54

82. J.P.C. (1964) 70.
83. See C.J.M. Aronson, Intention, Oxford 1950 at p. 35.
86. Id. at 112.
87. Id., for the formulation of this qualified defence see (1956) 12 A.L.J.R. at 231.
88. Id. at 237.
on the evidence by the defence, the prosecution will have to establish beyond reasonable doubt
(a) for a conviction of murder, that the accused was not acting in self-defence at all, or
(b) for a conviction of manslaughter, that the accused, though acting in self-defence, exceeded the limits of self-defence, as regards the means or force he used.

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

It was urged for the defendant-appellant that the onus of satisfying the jury that he acted in self-defence lay on the defendant but that, if they found self-defence, the onus then shifted to the plaintiff to satisfy the jury that the force used by the defendant was excessive or unreasonable in the circumstances. Under strict common law rules of pleading there was considerable support for this argument. In 1955, however, in Dunn v. Taylor & the Court of Exchequer held that since the Common Law Procedure Act, 1860, a mere pleader of issue without plea of excess was sufficient. The Ontario Court of Appeal relied on Dunn v. Taylor as denying the authority and relevance of the earlier authorities on common law pleadings on the issue they faced and concluded: "Self-defence is an answer to a claim for assault but only when the force used was not unreasonable in the circumstances. The reasonableness of the force is an integral part of the defence and, in my opinion, must be established by the defendant. . . . The defendant's plea, as here, was in effect a confession and avoidance, and the burden was on him to prove all the justifying circumstances one of which

88. R. (1954) 3 S. & G. 221. Mr. Justice Mathews avoids any difficulty which can be seen in a case like this by the definition of the defence offered by Mr. Justice Taylor in Joyce and Mr. Justice Sheppard in Boku. Mr. Justice Taylor refers to the defence applying if what the accused did was primarily for the purpose of defending himself (see the preceding paragraph), while Mr. Justice Sheppard directed the jury not to convict the accused of murder unless they found he was not acting in self-defence at all. (1954) V. & S. 363.
89. One type of "excess" may be ruled out to exclude the qualified defence entirely: Drown, in McKee, that McKee's first shot wounded the chicken slain in the leg. The trial judge, McKee walked up to him, took him before the judge on the ground, and shook to kill. Whereas if he had killed the thief, the first bullet he was guilty of manslaughter, a crime that murder would be the proper verdict on the facts pleaded. It is possible in such cases to distinguish the first excessively defensive shot from the subsequent attack and to regard the latter as not connected at all with self-defence of the defence of property. It would be a case of "malice unavowed under pretense of necessity." It may well be that any type of solicitude or other "excess" may have a similar result.
90. (1936) A.C. 702.
93. M. 304.
was that the force used was reasonable in the circumstances." They therefore dismissed the appeal.

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

The conflict between the rules associated in Mika v. Stoe and McClelland v. Symons raises another doubt as to the relevant rules in civil cases. If excess is proved by the plaintiff (McClelland v. Symons) or not disproved by the defendant (Mika v. Stoe) the defendant is liable in damages only for the injury caused to the plaintiff by the excess or for the injury caused by all the defensive force he has used. There is surprisingly little authority on this question, possibly because the topics covered are rarely divisible into those which were justifiable and those which were not.

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

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

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

Under certain circumstances an accused person has a defence of duress or coercion. There is authority that this defence does not apply to murder, but the possibility that in such cases the proper verdict is manslaughter and not murder has received little consideration. A recent Criminal Code has, however, incorporated this idea. The Wisconsin Criminal Code, 1935, provides by section 939.46 that:

"A person by a person other than the actor's co-occupant which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him to act to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter."100

It is submitted that the law should mitigate the penalty when the accused was subjected to genuine coercive pressure which threatened his life or bodily security, or that of his family, were he killed. Although one who under duress takes the life of an innocent person is (as the law stands) not guilty of first degree murder, he nevertheless does not manifest the same degree of homicidal wickedness as the murderer. The deterrent force of the law would not be weakened by such a result and a conviction of manslaughter better expresses the extent of guilt than does a conviction of murder.101 There is no case law supporting this result nor is there any opposing it. The reasoning in Binnie and McKay and the cases we have considered on that doctrine 50, however, lend support to the acceptance of this qualified defence of coercion or duress in murder cases.

The Wisconsin Criminal Code of 1935 has a similar provision concerning a qualified defence of necessity. Section 939.47 provides:

"A person by a person other than the actor's co-occupant which causes the actor reasonably to believe that his act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to himself or another and which causes him to act, is a defence to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter."111

The two main cases in Anglo-American law in which the defence of necessity has been considered in homicide cases are U.S. v. 108. Stone (1947) 49 W. T. 627, 638; Blackstone, 4 Com. 105, 110; the Criminal Law-See convolution of 1823 and the Draft Code of 1870; and the Code of Canada (s. 17); New Zealand (1900, s. 44 & 46 and Bill, 1829, c. 31); Queensland (s. 31); Western Australia (s. 20).


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

111. Binnie added.
and that it greatly complicates the task of the jury and the trial judge.

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

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

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

Cases like McKay itself underline the need for the availability of a conviction for this lesser crime. McKay clearly and greatly exceeded the necessity of the occasion judged on the facts as he saw them; he should not be acquitted. On the other hand, it exaggerates his wickedness to call him a murderer. When McKay was convicted of manslaughter and sentenced to three years' imprisonment there was no entry in the press biased, it is true, on ignorance and sentimentality, but indicating at least a deep social resistance to regarding him as a murderer.148 On appeal to the Court of Criminal Appeal the sentence of three years, imposed on him for manslaughter, was reduced to eighteen months. Five days after the rejection by the High Court of McKay's application for special leave to appeal, the Attorney-General announced the decision of the Governor-in-Council to release McKay immediately, so that he spent a total of three months in custody. It would be folly for the law to compel jurymen to choose between a conviction for murder and a complete acquittal in such a case as McKay. The facts in Howe are so profoundly different from those in McKay that there is a tendency to fail to perceive that the legal problem is the same—the criminal liability for the use of excessive and lethal defensive force. Assuming that a strong case can be made for the existence of this qualified defence in McKay, can the same be done in Howe? It is submitted that there is only one obstacle in the way of our ready acceptance of this defence in cases like Howe. This is that we find it hard to believe Howe (and the others who have told and will tell similar stories) was really defending himself at all. We suspect him of killing for the money he in fact stole from the deceased, or we suspect other equally unattractive motivations. Because of our doubt of the truth of Howe's statement, that he was attacked homosexually by a larger man and protected himself with the loaded rifle he claimed to have near at hand, there is a tendency to reject a qualified defence based on that statement, especially when we appreciate that the jury must disbelieve Howe's statement beyond reasonable doubt before they can convict him of murder. But it would be for course of confusion to establish undesirable roles of law because we do not trust the jury to apply desirable ones.

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

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

Finally, it is a mistake to assume that the existence of such a qualified defence will always favour accused persons. It may have the contrary effect. It may well be less of a "Gangster's Charter" than a wise technique whereby wrongdeeds, who would otherwise have been acquitted,
are convicted of manslaughter,17 and thus may help to affirm in the criminal law that reverence for life which is the fundamental requirement of a civilized community.

17. In *Mens* (1965) 38 C.R. 450, the High Court reversed the New South Wales Court of Criminal Appeal precisely because the accused was convicted of manslaughter pursuant to a judicial direction leaving open this possibility in a case where manslaughter was not open on the evidence. It was central to the High Court's reasoning that an accused person may very well be more likely to be convicted when the choice facing a jury is between murder or manslaughter or acquittal than when their choice is between murder or acquittal, as it should have been in *Mens*. 